A HISTORY OF ENGLISH LAW

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VOLUME X

To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law. ROGER NORTH

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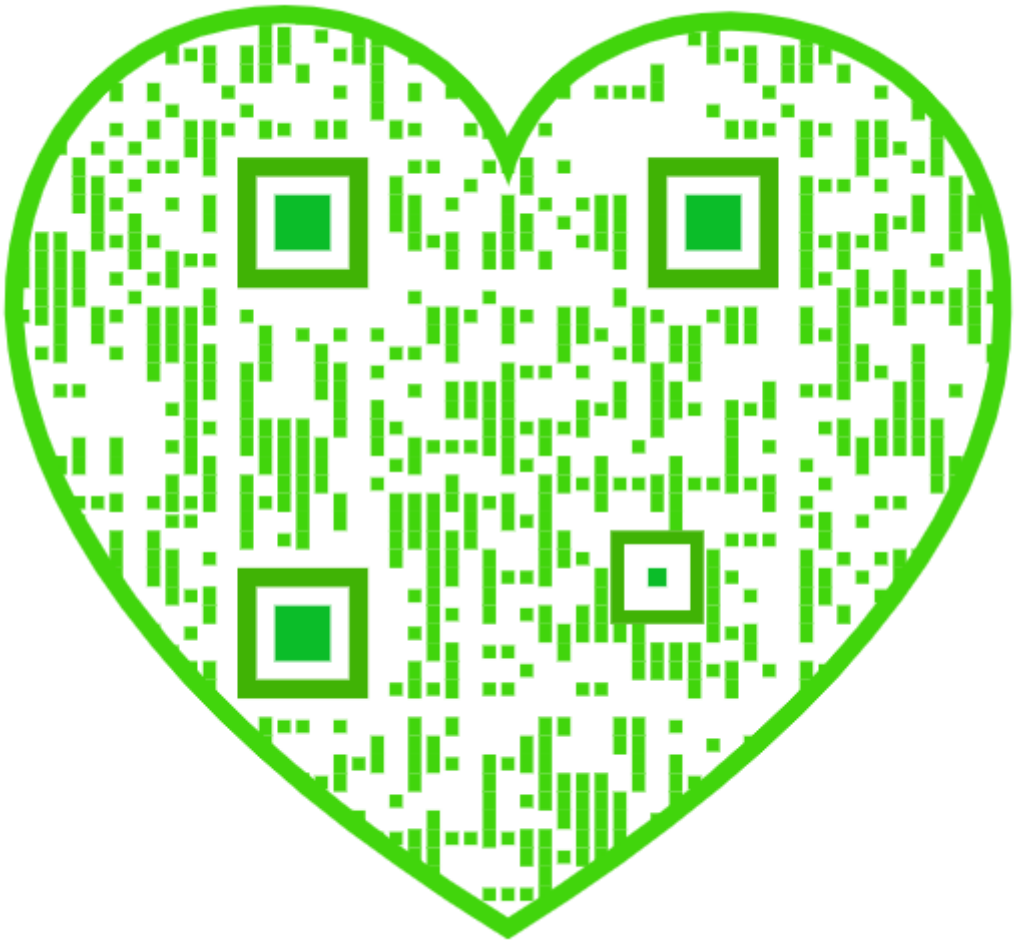

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TO

THE RIGHT HONOURABLE LORD WRIGHT OF DURLEY

LORD OF APPEAL IN ORDINARY

IN MEMORY OF THE DAYS WHEN HE AND THE AUTHOR

BOTH TAUGHT LAW

AT

LONDON UNIVERSITY

THIS WORK

IS

WITH HIS PERMISSION

DEDICATED

BY

HIS FORMER COLLEAGUE AND OLD FRIEND

PREFACE

IN the first and introductory volume, which contains Book I of this History, I have related the history of the Judicial System down to the passing of the Judicature Act in 1875. In the eight succeeding volumes, which contain Books II-IV, I have described the sources and influences which shaped the development of English law down to 1700, and I have related both the history of English public law during the same period, and also the history of the principal doctrines of English private law, in some cases to 1700 and in others down to the nineteenth century. These three succeeding volumes begin Book V, the last Book of this History, in which I propose to relate the history of English law from 1700 to 1875. They begin Part I of this Book, and they relate the history of public law, and of the sources and influences which shaped the development of English law, during the eighteenth century. If I continue to have sufficient health and leisure, I hope in a succeeding volume to complete Part I of this Book, and in Part II to complete the History in two more volumes by giving some account of the history of those doctrines of English law with which I have not fully dealt in the preceding volumes.

It may be thought that I have dealt with the legal history of the eighteenth century at too great a length. But there are several reasons why I have found it necessary to fill three bulky volumes. In the first place, this is the first complete legal history of the eighteenth century which has ever been written. In the second place, to make that history intelligible it has been necessary to deal somewhat more fully than in the preceding periods with the political background.

The Parliamentary history of this period, the history of the beginnings of the system of Cabinet government, the history and effects of the Act of Union with Scotland, the legislation as to Ireland, the beginnings of colonial constitutional law, and the legislation as to India, would not be intelligible without a full account of that background. In the third place, the growth of the colonies and the Indian Empire, the extension of the commerce and industry of Great Britain, and the demands of a more complex and a more civilized society, necessarily increase the complexity of the law both enacted and unenacted, and so make a more lengthy treatment of its history necessary. In the sphere of local government, for instance, and in the statutes relating to commerce and industry, the complexity caused by these demands is very obvious. Lastly, at several points, for instance, in my treatment of beginnings of bodies of local government law, of the royal prerogative, of the departments of the executive government, of the machinery of legislation, of private Acts of Parliament, of the legal profession, of case law, —I have found it necessary to go beyond the eighteenth century and to carry down the history of these topics to the nineteenth century. For this reason I think it will be possible to relate the rest of the history of public law and of the sources and influences which shaped the development of the law in a single volume.

I have to thank Dr. Hazel, the Principal of Jesus College, for his help in reading the proofs and for his suggestions and criticisms, and my son Mr. R. W. G. Holdsworth, Stowell Fellow and Tutor of University College, Oxford, for similar help. The indices and the lists of cases and statutes have been entrusted to the skilled hands of Mr. E. Potton, who prepared the consolidated index and the lists of cases and statutes to the preceding nine volumes.

All Souls College,
January, 1937

PLAN OF THE HISTORY

(Vol. I.) BOOK I.—The Judicial System: Introduction. Chap. I. Origins. Chap. II. The Decline of the Old Local Courts and the Rise of the New County Courts. Chap. III. The System of Common Law Jurisdiction. Chap. IV. The House of Lords. Chap. V. The Chancery. Chap. VI. The Council. Chap. VII. Court of a Special Jurisdiction. Chap. VIII. The Reconstruction of the Judicial System.

(Vol. II.) BOOK II. (449-1066)—Anglo-Saxon Antiquities: Introduction. Part I. Sources and General Development. Part II. The Rules of Law. § 1 The Ranks of the People; § 2 Criminal Law; § 3 The Law of Property; § 4 Family Law; § 5 Self-help; § 6 Procedure.

BOOK III. (1066-1485)—The Mediæval Common Law: Introduction. Part I. Sources and General Development: Chap. I. The Intellectual, Political, and Legal Ideas of the Middle Ages. Chap. II. The Norman Conquest to Magna Carta. Chap. III. The Reign of Henry III. Chap. IV. The Reign of Edward I. Chap. V. The Fourteenth and Fifteenth Centuries. (Vol. III.) Part II. The Rules of Law: Chap. I. The Land Law: § 1 The Real Actions; § 2 Free Tenure, Unfree Tenure, and Chattels Real; § 3 The Free Tenures and Their Incidents; § 4 The Power of Alienation; § 5 Seisin; § 6 Estates; § 7 Incorporeal Things; § 8 Inheritance; § 9 Curtesy and Dower; § 10 Unfree Tenure; § 11 The Term of Years; § 12 The Modes and Forms of Conveyance; § 13 Special Customs. Chap. II. Crime and Tort: § 1 Self-help; § 2 Treason; § 3 Benefit of Clergy, and Sanctuary and Abjuration; § 4 Principal and Accessory; § 5 Offences Against the Person; § 6 Possession and Ownership of Chattels; § 7 Wrongs to Property; § 8 The Principles of Liability; § 9 Lines of Future Development. Chap. III. Contract and Quasi-Contract. Chap. IV. Status: § 1 The King; § 2 The Incorporate Person; § 3 The Villeins; § 4 The Infant; § 5 The Married Woman. Chap. V. Succession to Chattels: § 1 The Last Will; § 2 Restrictions on Testation and Intestate Succession; § 3 The Representation of the Deceased. Chap. VI. Procedure and Pleading: § 1 The Criminal Law; § 2 The Civil Law.

(Vol. IV.) BOOK IV. (1485-1700)—The Common Law and Its Rivals: Introduction. Part I. Sources and General Development: Chap. I. The Sixteenth Century at Home and Abroad. Chap. II. English Law in the Sixteenth and Early Seventeenth Centuries: The Enacted Law. (Vol. V.) Chap. III. English Law in the Sixteenth and Early Seventeenth Centuries: Developments Outside the Sphere of the Common Law—International, Maritime, and Commercial Law. Chap. IV. English Law in the Sixteenth and Early Seventeenth Centuries: Developments Outside the Sphere of the Common Law—Law Administered by the Star Chamber and the Chancery. Chap. V. English Law in the Sixteenth and Early Seventeenth Centuries: The Development of the Common Law. (Vol. VI.) Chap. VI. The

Public Law of the Seventeenth Century. CHAP. VII. The Latter Half of the Seventeenth Century: The Enacted Law. CHAP. VIII. The Latter Half of the Seventeenth Century: The Professional Development of the Law.

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(VOL. X.) BOOK V. (1701-1875)—THE CENTURIES OF SETTLEMENT AND REFORM: Introduction. Part I. Sources and General Development; CHAP. I. The Eighteenth Century. Public Law.

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ERRATA

Page 82, line 26: *for* Browne's *read* Brown's.
„ 147, „ 18: „ Essx „ Essex.

BOOK V

(1701-1875)

THE CENTURIES OF SETTLEMENT AND REFORM

INTRODUCTION

DURING the latter half of the seventeenth century the laws and government of the principal states of Western Europe were assuming the form which they retained throughout the eighteenth century. Their laws had been developed into technical systems, capable of meeting their needs, under the influence of that Reception of Roman law which had affected them with varying degrees of intensity ; [1] and their government had taken the form of hereditary monarchies which were in practice, and, to a large extent, in theory, autocratic.[2] Both in the spheres of law and government, and in the spheres of art and letters, France was a model to many other countries in Europe. " Paris was then queen of two worlds : of that of politics by a tradition from the past, and of literature by a force and life vigorously evidenced in the present." [3] Voltaire, Montesquieu, and many other French writers disseminated throughout Europe the legal and political ideas, and the art and letters, of France, so effectually that they created a common intellectual atmosphere. That common intellectual atmosphere gives to the eighteenth century a character as distinctive as that of the Middle Ages.[4]

Just as the Middle Ages were, from some points of view, a static age, and yet an age of intellectual and political progress, during which the foundations of the territorial states of Western Europe were being laid ; so the eighteenth century was, from some points of view, a static age, and yet an age of intellectual and political progress, during which the foundations of modern democratic states were being laid. And, just as the Middle Ages were a period of transition from the turbulence of that long dark

[1] Vol. iv 240-252.

[2] As Sorel says, L'Europe et la Revolution Francaise i 15 and n. 4, in the eighteenth century, " on estimait que la république et la démocratie ne convenaient qu'aux petits Etâts : elles entrainaîent des mœurs pacifiques et une politique modeste. Montesquieu est, sur ce point, d'accord avec Rousseau."

[3] Bagehot, Biographical Studies 264. " France . . . has carried the arts and sciences as near perfection as any other nation. . . . And in common life, they have, in a great measure, perfected that art, the most useful and agreeable of any, *l'art de Vivre*, the art of society and conversation," Hume, Essays (ed. 1875) i 159.

[4] Sorel, op. cit. i 147-157.

age which followed the overthrow of the Roman Empire, to the period which began with the allied movements of the Renaissance, the Reformation, and the Reception of Roman law; so the eighteenth century was the period of transition from the religious, political, and social turbulence, with which these allied movements were accompanied, to the present age of democracies, scientific discoveries, and machinery, which began with the French Revolution and the Industrial Revolution.[1]

Though the eighteenth century was, for the most part, a static century in the spheres of law and politics, it was not a static century in the sphere of speculation on philosophical, political, economic, and religious subjects; and, in the latter part of the century, these speculations, coupled with discoveries in the physical sciences and the application of these discoveries to industry, were portending great changes in the near future. Even in the sphere of politics there was one matter of vital importance to the states of Western Europe in which this century was the reverse of static.

The sixteenth century was the age not only of the Renaissance, the Reformation, and the Reception of Roman law, but also of the discovery of new worlds in the East and the West. From the latter part of the sixteenth century, the existence of these new worlds, and their repercussions on the old world, had begun to exert an increasing influence on European politics. During the seventeenth and eighteenth centuries the maritime states of Western Europe—Spain, Portugal, France, Holland, and England —struggled for the control of some portions of these new worlds. England was a late starter in this struggle; but, in spite of the loss of her American colonies in the war of independence, she had, by the beginning of the nineteenth century, gained a more extensive colonial dominion than any of her rivals. This was England's greatest achievement in the eighteenth century. It was due primarily to the growth of her sea power, her commerce, and her industry. But this growth was also intimately related to the peculiar character of her law and political institutions, which had enabled "the Spirit of Reason to find there a not too precarious home," and to realize in some measure "the great ideals of the Renaissance."[2] The constitutional character of the English government compelled the rulers of the English state to govern in accordance with the needs and wishes of the governing

[1] "The conflict and torment of the religious struggles, into which the whole energies of the Renaissance had been plunged, were over; the infinite agitation ushered in by the French Revolution had not yet begun. The interval was one of toleration and of repose; of toleration which would have seemed incredible to the age which preceded it; of repose which seems no less incredible to ours," Lytton Strachey, Characters and Commentaries 12.

[2] Ibid 256.

classes of the nation. Those classes demanded the concentration of the energies of the state on the maintenance of a navy strong enough to prevent invasion, to protect its commerce, and to defend its colonies; and legislation which protected and promoted native industries and foreign trade. At the same time, the liberty which English law secured to individuals fostered qualities of initiative and self-reliance, which gave to the English colonies a vitality which was possessed by the colonies of no other nation. And so the eighteenth century is for England pre-eminently the age of expansion. At the end of it there had emerged, not only a United Kingdom of Great Britain and Ireland, but also a Greater Britain beyond the seas and an Indian Empire, which were carrying the law and the political institutions of England round the world.

The law and the political institutions of the English state, which helped so materially to forward the expansion of England, differed considerably from the law and political institutions of the principal states of Western Europe. But in the eighteenth, as in earlier centuries, England was not unaffected by European political, intellectual, and social conditions. England was unique in that she had secured a native body of law continuously developed on its own lines, a constitution in which Parliament was the predominant partner, and the supremacy of the law over all persons, and even over the prerogative of the King. But the English monarchy had, as Lord Chesterfield remarked,[1] many characteristics in common with the absolute monarchies of the Continent; and the structure of English society was, in its broad outlines, almost as aristocratic as that of the Continent. Similarly, both in England and on the Continent, the principles of law, public and private, which had been settled as the result of the conflicts of the sixteenth and seventeenth centuries, were accepted as basic, and were logically developed during this century to meet the new needs of a slowly changing society.

There was much that was admirable in this comparatively static eighteenth century; and many of its admirable qualities are typified by the classical correctness of the literary style of its great poets and prose writers, in the dignity and sense of proportion which characterizes its architecture, in the taste shown in the furnishing and decoration of many houses great and small in town and country.[2] It was in many respects a better century than its predecessors.[3] There was less internal disorder; and, though there was much coarseness of manners and much brutality

[1] Chesterfield Letters no. vii, Works (ed. 1774) ii 32.

[2] G. M. Trevelyan, England under Queen Anne i 26-27.

[3] Voltaire could say with some justice in his first chapter of his Siècle de Louis XIV that it was "le siècle le plus éclairé qui fut jamais."

in all classes, something was being done by many sorts of teachers —religious and secular—to remedy these evils. Literature and learning, the arts and sciences, flourished; and the refinement of manners, which came in their train, was spreading downwards from the higher classes, and was humanizing the nations.[1] Trade and manufactures were developing, and were creating new links between these nations. The struggle for the acquisition of colonies was spreading European civilization over the world. Necessarily the eighteenth century had the defects of its qualities. But, as the law and government of England were very different from the law and government of continental states, the defects which manifested themselves in England were different, and, on the whole, less serious than those which manifested themselves in France, and in the continental states which had formed themselves on the French model.

The defects which appeared in the governments of these continental states were mainly due to the fact that they were absolute monarchies. First, in the earlier part of the century there was too rigid an adherence to old ideas, and too little tolerance of the new ideas which either experience or advancing knowledge suggested.[2] Secondly, there was, more especially in the Roman Catholic states, a theological intolerance, which made for the suppression of original thought, and aggravated the tendency of all autocracies to stand upon the ancient ways.[3] Thirdly, they had the defect which characterizes all absolute monarchies—too much depended on the personal character of the ruler. The English state was, to a large extent, though not wholly, free from these defects. In England there was a large liberty to discuss political and other topics.[4] Though religious nonconformists, and especially the Roman Catholics, were

[1] "At Bath Beau Nash employed his despotic power to compel the fashionable world to lay aside their swords when they entered his domain: in this he did as good service to the community as in teaching the country bumpkins to discard their top boots and coarse language at the evening assemblies and dances. During his long supremacy as Master of the Ceremonies Nash did perhaps as much as any other person even in the eighteenth century to civilize the neglected manners of mankind," Trevelyan, op. cit. i 39.

[2] "La saine philosophie ne fit pas en France d'aussi grand progrès qu'en Angleterre et à Florence; et si l'academie des sciences rendit des services à l'esprit humain, elle ne mit pas la France au-dessus des autres nations. Toutes les grands inventions et les grandes vérités vinrent d'ailleurs," Voltaire, Siècle de Louis XIV chap. xxxii.

[3] See Lecky, History of England vi 191-193 for the intolerance of the Roman Catholic church in France; Morley points out, Voltaire 228, that "the Parliament of Paris was the eager ally of the bigots of the court in 1757, in fulminating deadly edicts against the Encyclopædia and all concerned in its production or circulation. In 1762, the year of the production of Emile and the Contrat Social, not all the influence of Rousseau's powerful protectors could prevent the launching of a decree of arrest against him. Bloodier measures were not wanting."

[4] Vol. vi 377-378; vol. viii 345; below 28-29.

subject to disabilities, though attacks on Christianity were criminal offences, freedom of speculation was not materially hampered by theological intolerance.[1] The necessity which the government was under of explaining and justifying its measures to Parliament, made it impossible to entrust the great offices of state to wholly incompetent men.[2]

On the other hand, the English government was subject to other defects. The control exercised by Parliament, and the supremacy exercised by the law, weakened the executive ;[3] and the native and continuous development of the law and the machinery of government, coupled with the need to get Parliament's consent to any change in the law, prolonged the life of all sorts of survivals, which were detrimental to efficiency. But these defects were not so serious as the defects inherent in the absolute governments of the Continent. The freedom of discussion permitted in England made for a more enlightened political philosophy than was possible abroad.[4] All the important interests in the nation could make their voices heard in Parliament ;[5] and, in spite of the disturbing influence of the Hanoverian connection, they saw to it that England concentrated her efforts on the essentials of expansion—sea power, colonies, overseas trade, and the encouragement of native industries. The personal freedom secured to Englishmen by their constitution favoured individual enterprise in commerce and colonization. "Of all peoples," said Montesquieu, "the English know best how to give due weight at once to these three great matters—religion, commerce, and liberty."[6]

These characteristics of English law and government attracted the attention of continental thinkers, because it was the absence of these characteristics which was the great defect of the governments under which they lived ; and through writers, such as Voltaire and Montesquieu, English political practice and theory began to influence continental political thought.[7] Conversely, later in the century, continental speculation influenced English thought.[8] For, though the law and government of England were very different from the law and government of continental states, there were, as we have seen, many similarities between English and continental society and thought.[9] This similarity tended to

[1] Vol. viii 409-410 ; Morley, Voltaire 218-219. "Roman services, so long as they were conducted with some degree of privacy, were not interfered with at all. . . . In every county in England, Roman Catholic nobles or gentlemen kept priests whose presence was neither obtruded on public notice nor inquired into by the authorities," Trevelyan, England under Queen Anne i 56.

[2] Vol. xi 276. [3] Below 143-144, 706. [4] Above 6 n. 2.

[5] Leslie Stephen, The English Utilitarians i 16-17 ; below 565-569.

[6] L'Esprit des Lois, Bk. xx chap. vii. [7] Sorel, op. cit. i 162-163.

[8] Halévy, Growth of Philosophic Radicalism (English tr.) 18, 434-435.

[9] Above 5.

increase, because the new ideas and discoveries of this century, which added to the common intellectual stock of Western Europe, preserved and intensified the common intellectual character of eighteenth-century thought upon philosophy, religion, law, politics, and economics.

The dominant intellectual characteristics of the eighteenth century which are common to English and continental countries can be summed up as follows:

First, most of the political speculation of the day was of the *a priori* order. Both lawyers and political thinkers continued to use those illusive concepts "Nature" and "Natural"; and to the concept "Law of Nature" or "Natural Law" they gave a new meaning which greatly increased its importance. We have seen that in the Middle Ages and later the distinction between natural law and divine law was fine: [1] in the eighteenth century natural law and divine law tended to be identified. Newton and his predecessors Copernicus, Kepler, and Galileo had shown that the laws of nature were discoverable; [2] and students of Newton's work, and still more the students of the works of those who popularized Newton,[3] began to think that the law of God could best be discovered by the study of the natural phenomena of the universe. Thus the laws of nature were deified. At the same time Locke taught that men's ideas "are the result of the sensations that flow in upon us from the natural and social world without, and of the operations of the reflecting mind upon these sensations," so that men may attain knowledge "barely by the use of their natural faculties." [4] Therefore men came to think that both the physical laws of the universe, and the laws which governed the human understanding and the conduct of individuals and societies, were all dependent on natural laws discoverable by the human intellect. "In the eighteenth century, these truths were widely accepted as self-evident: that a valid morality would be a 'natural morality,' a valid religion would be a 'natural religion,' a valid law of politics would be a 'natural law'." [5]

Secondly, and consequently, lawyers, political thinkers, and economists used this concept of natural law to advocate reforms in the faulty machinery of law and government which they saw

[1] Vol. ii 602; vol. iv 279-280.
[2] Becker, The Declaration of Independence 39-42.
[3] Ibid 43-47. [4] Ibid 56-57
[5] Ibid 57; this point of view is illustrated from a tract by Tench Francis on money which is cited by Pownall, Administration of the Colonies (4th ed.) 208; Francis says, "the rules of natural justice flowing from our fixed and unchangeable relations to each other, and the invariable nature and order of things, enforced by the express commands of God, are of eternal and indispensable obligation. No laws, no combinations of human power, customs, usages, or practice, can control or change them."

round them. In the sphere of law Helvetius,[1] Beccaria,[2] and Bentham [3] based their jurisprudential theories upon rational considerations, deduced from fundamental laws determining human action, which they thought that they had discovered. In the sphere of politics Locke based his theory upon the assumption that every man has inalienable natural rights to life, liberty, and property, and that the state was created to secure those rights.[4] In the sphere of economics the physiocrats in France, and, to a large extent, Adam Smith and other thinkers in England, deduced their conclusions from assumed natural laws.[5] Thus reason and nature were the operative agencies relied upon to remove anomalies and "Gothic" survivals,[6] which hindered the onward progress of mankind. In the sphere of theology, we are told,[7] the contempt shown for patristic studies "was typical of the general temper of the age towards the heritage of the past." To Hume the chief advantage to be derived from a study of mediæval history was to show up in brighter relief the civilization of the period in which he was writing.[8]

Thirdly, the men who were preaching these new ideas, the men who, in the light of these ideas, were advocating and rendering inevitable great changes in the life and structure of the state and society, generally agreed, and not unreasonably, that the best way to realize their aims was through the political power of an autocratic ruler, or, in England, through the power of the Crown and the ruling aristocracy. In the opinion of many continental thinkers representative assemblies and constitutional restrictions were impediments to the abolition of those old laws and institutions, which conflicted with their idea of what was reasonable and natural, because they hindered the reforming

[1] Halévy, op. cit. 18-21. [2] Ibid 21, 56-59.

[3] Bentham, it is true, denounced the concepts of natural law and natural rights as fictions, Theory of Legislation 82-87; but his criterion of utility is the criterion of reason, which is, in effect, the same criterion as that used by those who appealed to the law of nature, see vol. ii 602-603, and Dicey, Law and Opinion 143-144 there cited; Bentham's originality consisted, not in the use of the criterion of utility, but in the minute way in which he applied that criterion to all the rules of law, and to all questions of conduct and morals.

[4] Vol. vi 284-286.

[5] Leslie Stephen, English Thought in the Eighteenth Century ii 306, 315, 317-319; Halévy, op. cit. 267-270; vol xi 503-506.

[6] Voltaire in his Siècle de Louis XIV chap. xxix speaks of the feudal elements surviving in the French land law as "des décombres d'un bâtiment gothique ruiné"; Blackstone several times uses the adjective "Gothic" to mean primitive and out of date, see e.g. Comm. i 238, 341; Burke in 1770 said that the opposers of a motion as to ex officio informations could not plead antiquity—"they are beat out of the entrenchments of Gothic rubbish, under which they hoped to remain impregnable," Parlt. Hist. xvi. 1152; Trevelyan, England under Queen Anne i 42, tells us that "the famous diplomat Richard Hill . . . described his countrymen as 'a drunken Gothic nation that loves noise and bloody noses'."

[7] N. Sykes, Church and State in England in the Eighteenth Century 423.

[8] Ibid. 423-424, citing Hume, History of England iii 297.

action of a benevolent despot [1]—Voltaire preferred " to obey a fine lion much stronger than himself than two hundred rats of his own species " ; [2] and Hume considered that a despotism was best suited to an old and a civilized state.[3] Most English thinkers distrusted any change which would upset the balance of a constitution in which the element of democracy was very small.[4] It was for this reason that so many of the princes in the latter half of the century had no fear of the new ideas. They believed that they could always keep them in control, and use them to justify the reforms of which they approved.[5] In fact, in the latter half of the century, many princes became converts to these new ideas—it was the age, it has been said, of the " repentance of monarchy." [6] Amongst them were Frederick the Great, Catherine of Russia, Joseph II, Gustavus III, and many German princes ; and France had as ministers Malesherbes, Turgot, and Necker.[7] Similarly, in England the party of reform was gathering strength ; and the accession to power of the younger Pitt gave promise of a policy which would gradually adapt English law, public and private, to the new social and economic conditions which were being produced by the industrial revolution.[8]

Fourthly, it is not surprising that, in these circumstances, very many thinkers believed in the possibility of the indefinite progress of mankind. As Morley has truly said, " the dominant belief of the best minds of the latter half of the eighteenth century was a passionate faith in illimitable possibilities of human progress." [9]

These, then, were the dominant intellectual characteristics of the eighteenth century both in England and abroad. But, though England and the Continent had much in common, there were, as we have seen,[10] also great differences in institutions and laws. Two of the consequences of these differences were destined

[1] Sorel, op. cit. i 101-102, 107-108 ; Halévy, Growth of Philosophic Radicalism 140-142 ; Bagehot, Biographical Studies 270-271.

[2] Cited by Kingsley Martin, French Liberal Thought in the Eighteenth Century 140.

[3] Leslie Stephen, English Thought in the Eighteenth Century ii 186.

[4] Below 519, 565-566.

[5] " L'alliance entre eux est toute naturelle. Les rois ont besoin d'entraîner l'opinion publique : les philosophès en disposent. Les philosophes ont besoin de l'appui du bras séculier : les princes la leur prêtent. Les uns et les autres travaillent chacun pur soi : les princes au triumphe du pouvoir absolu, les philosophes à l'avénement du régne des lumières ; mais ils partent ensemble, et font cause commune dans leur campagne contre le passé. C'est pourquoi les princes considèrent avec tant de quiétude les temérités de la philosophie, et se montrent si indulgents aux turbulences des philosophes. Ils croient les tenir en bride, et demeurer tourjours maîtres de les mener a leur guise," Sorel, op. cit. i 112.

[6] Acton, Lectures on Modern History 302.

[7] Sorel, op. cit. i 114-115 ; Lecky, History of England vi 203-206.

[8] Below 124-125.

[9] Rousseau ii 119 ; cp. Halévy, op. cit. 53, 219-221.

[10] Above 6-7.

to have a decisive influence on the course of English legal and constitutional history in that new era of reform which opened with the French Revolution.

In the first place, in England the best minds of the century were satisfied with the balanced English constitution.[1] In France and other states, the government of which was formed on the French model, the best minds of the century were profoundly dissatisfied with the government. In the second place, though in England dissenters from the established church were under disabilities, and though atheists were liable to be prosecuted, there was no religious persecution ; and the established church was unable to limit freedom of discussion.[2] Hence, although there was a certain amount of infidelity in the higher ranks of society, the established church was accepted as a necessary part of the state, and the people as a whole were profoundly religious.[3] In France, on the other hand, a persecuting church, possessed of great political power, tried to stifle all free discussion, with the result that the hatred which the intellectual leaders felt towards a church which persecuted them, tended to make them hostile to all religion, and, as their opinions gathered weight, to infuse this hostility to religion amongst all classes of the people.[4]

These two differences between England and continental countries were the cause of two great differences in the practical influence of the new ideas of the eighteenth century upon their legal and political history.

First, in England the course of legal and political history was very little affected by philosophical theories. In the eighteenth century, as in the age of Elizabeth,[5] fundamental principles were taken for granted. Men's minds were directed to securing practical measures of reform, which were inserted into the existing fabric with the minimum of change ; [6] and the discussion

[1] Vol. xi, 278. [2] Above 6-7.

[3] " We know, and what is better we feel inwardly, that religion is the basis of civil society," Burke, French Revolution 134 ; Englishmen " do not consider their church establishment as convenient, but as essential to their state, not as a thing heterogeneous and separable ; something added for accommodation ; . . . they consider it as the foundation of their whole constitution, with which, and every part of which, it holds an indissoluble union. Church and state are ideas inseparable in their minds, and scarcely is one ever mentioned without mentioning the other," ibid 147-148.

[4] " L'irreligion, en Angleterre, n'était qu'une affaire de ton et de mode, une débauche transcendante, un raffinement et une affectation aristocratiques. En France, c'était une passion dominante et générale ; tout le tiers état en était animé, et, sur beaucoup de points, elle avait gagné jusqu-aux les multitudes," Sorel, op. cit. i 355 ; when Hume, Essays (ed. 1875) i 125, said that the clergy had lost much of their credit, and that " even religion can scarcely support itself in the world," he was speaking for a very inconsiderable circle.

[5] Vol. iv 214-215.

[6] Leslie Stephen, English Thought in the Eighteenth Century ii 187; The English Utilitarians i 132-133.

of these reforms was generally conducted with that legalist appeal to history and precedent which had always been characteristic of the English Parliament.[1] It was therefore inevitable that the minds of many Englishmen should be attracted more by writers like Montesquieu, who based their deductions on history, than by writers who deduced their conclusions by the prevalent *a priori* methods. In France Montesquieu "was more often admired than read and more often read than understood."[2] He was both understood and appreciated in England. "His English admirers, it is said, first taught the French to appreciate the prophet who had gained little honour amongst them."[3] Burke, who was unique in his appreciation of the complex historical elements which unite to form the life and law of a nation, and in his distrust for *a priori* theories, pronounced an eloquent panegyric on his work;[4] and Blackstone, whose Commentaries are marked by all the characteristics of the historical school, was familiar with it and appreciated it. Helvetius and Beccaria never had the same importance in England as they had abroad, because there was no such urgent need for the reforms which they suggested; and Bentham addressed his earliest ideas on codification to continental thinkers, because England was not then ready to receive them.[5]

Secondly, since the English as a whole were profoundly religious, discontent with social and moral evils took the form of the religious revival of the Methodists.[6] In France the hatred of the church felt by the intellectual leaders of the country, caused this discontent to take the form either of the denial of the truth of all religion, or, later, the form of that emotional religion of nature preached by Rousseau. In England an important school of reformers took their inspiration from the Bible: in France from the *Contrat Social*.[7]

[1] Leslie Stephen, The English Utilitarians i 17-18.

[2] Sorel, op. cit. i 100.

[3] Leslie Stephen, English Thought in the Eighteenth Century ii 188.

[4] Appeal from the New to the Old Whigs, Works (Bohn's ed.) iii 113; the thought behind Montesquieu's view, Esprit des Lois, Bk. xi chap. vi, "que l'excès même de la raison n'est pas toujours désirable, et que les hommes s'accommodent presque toujours mieux des milieux que des extrémités," exactly corresponds to the thought behind Burke's dictum, French Revolution 91-92, that "the rights of these theorists are in extremes; and in proportion as they are metaphysically true, they are morally and politically false. The rights of men are in a sort of middle, incapable of definition, but not impossible to be discerned."

[5] Halévy, op. cit. 86.

[6] Lecky, History of England iii 145-146.

[7] Leslie Stephen, English Thought in the Eighteenth Century ii 432-433; Methodism was, as M. Halévy has said, "the antidote to Jacobinism," History of the English People in 1815 (Eng. tr.) 514; but I think that M. Halévy, op. cit. 371-372, is inclined to exaggerate its influence in preventing revolution; the balanced British constitution, the rule of law, and the existence of a poor law also had some influence; Louise Michelle said that a system of poor relief like that of England would have prevented the French Revolution, Leonard, English Poor Relief 303.

Rousseau repudiated the religious scepticism of the school of Voltaire and the philosophers.[1] His emotional religion of nature inculcated and promoted a religion of humanity and a simpler life; and, for that reason, it helped the progress of the reforms advocated by the philosophers and their followers. But his religion of nature was accompanied by a new theory of the state, based on the theories of Locke and Hobbes,[2] which led to political conclusions as different from theirs as Rousseau's religious, was different from their sceptical, temperament.[3] That theory was based on the natural equality of all men; on their equal rights to liberty, property, security, and resistance to oppression; and on their equal rights to political power. Each citizen has, by the terms of the *Contrat Social*, given up his individual rights to the whole society which forms the state. The general will of these equal citizens composing the whole society is the sovereign power in the state which is unlimited, indivisible, and inalienable. Since it resides in the general will it cannot be exercised by representatives. The sovereign people must exercise their own will in person.[4] The absurdity of this theory is patent. Apart from the obvious untruth of the theory that all men are equal, and the consequent untruth of the deductions from that theory, it is clear that the general will of all the citizens, which is the sovereign power in the state, could only be made effective in a small city state. Rousseau himself recognized that his theories could not be applied in practice.[5] But in proportion as persons or classes are uneducated, or educated merely in a bookish and academic way, the greater is the appeal which an abstract theory makes to them—more especially when that theory magnifies their powers and guarantees to them advantages.[6] Because

[1] For the fundamental difference between Rousseau and the philosophers who compiled the Encyclopædia see Kingsley Martin, French Liberal Thought in the Eighteenth Century 109-115; cp. Leslie Stephen, English Thought in the Eighteenth Century ii 193.

[2] Morley, Rousseau ii 149-154; as Morley says, ibid at p. 152, the action of Hobbes on Rousseau "resulted in a curious fusion between the premises and temper of Hobbes and the conclusions of Locke. This fusion produced that popular absolutism of which the Social Contract was the theoretical expression, and Jacobin supremacy the practical manifestation"; cp. Leslie Stephen, English Thought in the Eighteenth Century ii 191-193.

[3] Kingsley Martin, op. cit. 132. [4] Ibid 207.

[5] Ibid 208-212. "It would be easy to cite many passages of sound practical sense, many luminous suggestions which would surprise those who only know Rousseau as 'the great professor and founder of the philosophy of vanity,' whose writings were the Jacobin 'Canon of holy writ,'" P. F. Willert, Camb. Mod. Hist. viii 31.

[6] "To his followers in the next generation one text of the master was as authoritative as another; and they naturally cited those which flattered the passions or justified the policy of the moment. . . . No attention was paid to him when he spoke words of soberness and wisdom, based on experience and common sense. . . . They were brushed aside by his revolutionary followers; and they have had no such effect on European politics as the clear and precise dogmas of natural equality and freedom, of inalienable popular sovereignty, and their corollaries," Camb. Mod. Hist. viii 28-29, 31.

Rousseau's political theory magnified the power of the people, because it guaranteed to them liberty and other rights, because it was combined with his emotional religion of nature and was preached with religious fervour, it became a political religion which made fanatics.[1] The American and the French Revolutions were the first great victories of the " definite and authoritative dogmas " [2] of this new religion ; and these dogmas soon ripened into an orthodox creed. That creed has been elaborated and extended in many different directions ; and it has been subjected to many different interpretations. But, since it has given increasing powers and privileges to the devotees of its various forms, it has exerted and is exerting an ever-increasing fascination upon the nations of the world.[3]

Abuses real or imaginary, which are so keenly felt that they lead to widespread discontent, have always created a demand for theories of the type put forward by Rousseau ; for this discontent generally leads to the advocacy of some variety of democratic theory. Bagehot says : [4]

> There are certain theories of political philosophy which supply ready arguments against almost every state of society which has been able to maintain a long existence. These heresies float among the most ordinary ideas of mankind, and are ready without the least research to the hand of whoever may believe that he wants them. Latent discontent with the existing form of government catches hastily at whatever justifies it ; it seeks in these old forms of false doctrine a logical basis for itself. One of these heresies is the purely democratic theory of government. . . . In every age and in every country a class which has not as much power as it thinks it ought to have snatches at the notion that all classes ought to have equal powers. Such an " uneasy class " believes that it ought to have as much power as the class which is in possession ; and not liking to put forward even to itself a selfish claim of individual merit, it tries to found its pretensions on the " equal rights of all mankind."

There is no doubt that Bagehot's analysis explains some of the causes of that drift to democracy which, in spite of occasional setbacks, is observable, throughout the nineteenth century, in the states of Western Europe and all other states which have come under their influence. The beginning of this drift, which marks the end of the eighteenth century and the beginning of the era in which we are now living, date from the American, and more especially from the French, Revolutions.

During the decade before the outbreak of the American war of independence, there was much discontent in England.[5] Radical reforms were proposed, and democratic ideas made their

[1] Morley, Rousseau ii 137-138.
[2] Leslie Stephen, English Thought in the Eighteenth Century ii 193-194.
[3] Lecky, History of England vi 266-270.
[4] Essays on Parliamentary Reform 85.
[5] Below 102.

appearance. With some of these ideas the Americans were familiar. But to justify their rebellion some more general principles were needed. Locke's "Two Treatises of Government" assisted by Rousseau's *Contrat Social*, by Paine's trenchant reasoning in his pamphlet entitled "Common Sense," and by the new connotation which the concepts of natural law and natural rights had gathered in eighteenth century philosophy,[1] supplied these principles. They so captivated the imagination of the Americans that they echoed them in 1776 in their Declaration of Independence.[2] "We hold these truths to be self evident," runs the Declaration, "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that amongst them are Life, Liberty, and the pursuit of Happiness, that to secure these Rights, Governments are instituted, deriving their just powers from the consent of the governed." This represented an order of ideas very different from that set forth in the Bill of Rights. In fact, the American declaration envisaged the new democratic ideas of the future, whilst the Bill of Rights envisaged the ideas which formed the basis of the balanced aristocratic British constitution of the eighteenth century. The latter enshrined the creed of the Old Whigs: the former of those New Whigs from whom Burke appealed to the Old.

The success of the Americans was the first great victory of the democratic ideas preached by Rousseau; and it had an immediate repercussion in Ireland. Among the Americans were many Irishmen who had been forced to emigrate by the disastrous economic conditions of their country. The American struggle had been watched with intense interest by Ireland, because it had a very direct bearing on the claim of the Irish Parliament to emancipation from the control of the British Parliament; and the successful issue of that struggle was followed in 1782 by its emancipation from that control.[3] But if the influence of Rousseau's ideas had stopped there, their history would have been comparatively unimportant. The treaty of Versailles (1783) which recognized the independence of America, and the settlement of domestic discords after the victory of the King and the younger Pitt in 1784,[4] put an end to projects of radical reform in England. The Americans, in spite of the high-sounding generalities of their Declaration of Independence, did not abandon the institution of slavery; the suffrage in many

[1] Above 8.

[2] Camb. Mod. Hist. vii 174, 188-189, 207; Becker, The Declaration of Independence 27-28, thinks, probably rightly, that the framers of the Declaration were much more influenced by Locke than by Rousseau; but the emphasis laid on these general principles savours more of Rousseau than of Locke.

[3] Below 108; vol. xi 31-32.

[4] Below 112.

of the States was very limited ; [1] in the formation of their federal constitution they returned to the constitutional ideas embodied in the Bill of Rights ; [2] and they specially emphasized that separation of powers which Montesquieu had taught all eighteenth-century political thinkers, English and foreign, to regard as the efficient cause of the merits of the English constitution.[3] It was the position which France occupied in eighteenth-century Europe, and the course which the Revolution pursued there, which were the reasons why it was the French Revolution based on the theories of Rousseau, and not the American Revolution based on the self-evident truths of the Declaration of Independence, which gave to Rousseau's theories their great importance in the succeeding century. It was the success of the French Revolution which converted them into a dogmatic religion which has become the creed of modern democracies.[4] But for the French Revolution, and its effects upon the political thought of the following century, the self-evident truths of the American Declaration of Independence would have had as much and as little effect as many other grandiose preambles to legislative acts.

The grievances which led to the successful assertion of their independence by the Americans, were small in comparison with the grievances of the French people. The government of France was oppressive, unjust to the lower classes, extravagant, and bankrupt. It is true that there were other governments in Europe in which the same or worse abuses appeared. But in France the writings of the philosophers,[5] the teachings of Rousseau, and the example of America, to whose success France had largely contributed, made these abuses appear insupportable.

[1] Maine, Popular Government 210-211 ; in some states, however, Rousseau's influence was greater, and " administrative inefficiency was ensured by providing for the annual or biennial elections of their legislatures and officers," Kingsley Martin, French Liberal Thought 218.

[2] " The temper of the Constitutional Convention was as conservative as the Declaration of Independence was revolutionary," Acton, Lectures on Modern History 314 ; in 1798 the United States refused to allow the Irish people to be deported there, on the ground that they wanted no more Irishmen who were infected with French ideas, Lecky, History of Ireland v 98-99.

[3] Below 718-722.

[4] " When the teaching of Rousseau found its way to America, it was used, not in attempts to create a new heaven and a new earth, but to give the dignity of idealism and the attraction of romance to practical canons of conduct which had been slowly developing under the pressure of outward events. A little later we meet that principle in the Old World emancipated from these safeguards. Its expectations are no longer steadied by contact with historical facts, and it may at any moment become the stock-in-trade of charlatans, or the *ignis fatuus* of dreamers," J. A. Doyle, Camb. Mod. Hist. vii 174.

[5] In 1765 Horace Walpole wrote, " You will think the sentiments of *the philosophers* very odd *state news*—but do you know who *the philosophers* are or what the term means here? In the first place it comprehends almost everybody ; and in the next, men who, avowing war against property, aim, many of them, at a subversion of all religion, and still many more, at the destruction of regal power," Letters (ed. Toynbee), vi 335.

It is true that many medieval abuses had been abolished or mitigated. But, as Sorel has said,[1] those which remained became " more difficult to endure as they became less grievous : they exasperated those whom they no longer crushed." It is possible that a strong and able ruler might have restored the health of the state, and, without a revolution, have created a strong constitutional monarchy.[2] If that had happened the history of Europe in the nineteenth century would have been very different ; for the great attractive influence of French ideas would then have been exercised in another political direction. Unfortunately the French King was neither strong nor able.

In the years immediately preceding the Revolution Rousseau's religion of nature had helped forward the progress of the legal political and economic reforms advocated by the philosophers. It had inculcated and promoted a spirit of humanity, and the desire for a simpler life and purer morals. At the same time knowledge of all kinds, especially in the sphere of the physical sciences, was increasing.[3] Under these influences French society was never more hopeful, and never shone with a more attractive brilliance, than in the few calm years which preceded the storm.[4] " The best and most virtuous men," said Mathieu Dumas,[5] " saw the beginning of a new era of happiness for France and for all the civilized world." But this point of view was only possible for those who looked at France from the point of view of the court, the ruling classes, and the philosophers. It neglected the enormous anomalies and injustices which existed beneath the surface of that brilliant society—anomalies and injustices which the measures of the most enlightened ministers had failed to cure.[6] Very many of the causes which, in the middle of the century, had seemed to such observers as D'Argenson[7] and

[1] Op. cit. i 144 ; cp. De Tocqueville, L'Ancien Regime, Bk. iii c. 4.

[2] " S'il se fût trouvé alors sur le trône un prince de la taille et de l'humeur du grand Frédéric, je ne doute point qu'il n'eût accompli dans la société et dans le gouvernement plusieurs de plus grands changements que la Révolution y a faits non seulement sans perdre sa couronne, mais encore en augmentant beaucoup son pouvoir," De Tocqueville, op. cit. Bk. iii c. 3 p. 243.

[3] Lecky, History of England vi 264-265, 303-306 ; cp. Segur's description cited ibid 301-302 ; Sorel, op. cit. i 104-106.

[4] Lecky, op. cit. vi 306.

[5] Cited ibid ; in England, as Lytton Strachey, Characters and Commentaries 90, has pointed out, we see the same contrast between " the age of Fielding and Hogarth and Warburton on the one hand, and the age of Sterne and Reynolds and Hume on the other . . . sceptics were everywhere stepping into the shoes of deists ; in France the same movement at the same time brought about the triumph of the Encyclopædia. Whatever may have been the causes of this remarkable revolution, there can be no doubt that the latter half of the eighteenth century attained to a height of civilization unknown in Europe since the days of Hadrian."

[6] Lecky, op. cit. vi 278-292 ; Walpole, Letters viii 61-62, 81.

[7] His well-known prophecy made in 1754 is cited by Lecky, op. cit. vi 217 ; Lecky thinks, ibid 219, that Madame de Pompadour saved the country from a rising in 1754 by inducing the King to reinstate the Parlément of Paris and to release the magistrates.

Chesterfield [1] to portend a speedy revolution, had not only remained unremedied, but had become more acute, and more keenly felt by reason of the searching criticism to which the philosophers had submitted them. The popularity of the young King and Queen, and satisfaction with the results of the American war, had merely glossed over the deep-seated diseases of the state; and it was only a few who saw that the reign of reason and enlightenment only served to shed so terrible a light on them, that a revolution was inevitable, unless the state had been guided by exceptionally able rulers.[2]

Louis XVI and his ministers were weak and incapable. They were unable either to direct or to control the public opinion of the nation. That opinion, impelled by the grievances of the poorer classes, by the national bankruptcy, and by the fact that 1789 was a year of famine,[3] was rapidly adopting Rousseau's democratic theories. Those theories have always appealed to crowded urban centres—the increase of these centres in the nineteenth century has been one of the most powerful of the causes for their spread.[4] They spread like wildfire in Paris in 1789. At the same time the growing disaffection of the army,[5] which was aggravated by the intensive propaganda accompanying the summons of the States-General,[6] deprived the government of its last chance of directing the gathering storm.

It was the generally prevailing ignorance of the real nature of the French Revolution which gave it time to develop sufficient strength to defeat the attempts made to suppress it. Continental governments at first regarded it merely as a series of events which weakened a rival, and from which therefore they could profit. "A Holy Alliance before 1789 would have been an historical paradox. Eighteenth-century Europe was incapable of it; and it needed the French Revolution to enable Europe to conceive the idea." [7] Until the universal character of the movement had been grasped—a character derived from the universal character of the political, social, and economic theories of the eighteenth century,—men did not see the need for an

[1] In his letter no. lvi, written in 1752, Works ii 232-233, he says, "This I foresee that [in France] before the end of this century, the trade of both King and Priest will not be half so good a one as it has been. Du Clos, in his reflections hath observed . . . *qu'il y a un germe de raison qui commenca a se developper en France.* A *developpement* that must prove fatal to Regal and Papal pretensions;" for other similar prophecies at this period see Lecky, op. cit. vi 227-228.

[2] Ibid 306, 309; Sorel, op. cit. i 103. [3] Lecky, op. cit. vi 344-346.

[4] Adam Smith remarked, Wealth of Nations (Cannan's ed.) ii 177, that "the political œconomy of the nations of modern Europe, has been more favourable to manufactures and foreign trade, the industry of the towns, than to agriculture, the industry of the country."

[5] Lecky, op. cit. vi 315, 339. [6] Ibid 342-343.

[7] Sorel, op. cit. i 71.

alliance, to propagate opposite ideas of a similarly universal character, in order to counteract its teaching.

In England the French Revolution was at first welcomed—but for a reason different from the selfish reasons which moved some continental sovereigns to welcome it. Many Englishmen thought that the French were about to accomplish what they themselves had accomplished in 1688.[1] It was only a few who saw further, and realized its unprecedented and its universal character. Burke saw this more quickly and more clearly than any other man in Europe. His " Reflections on the Revolution in France," and the events which showed the truth of his diagnosis, proved to his fellow-countrymen the need to combat a set of political theories which, if realized, would be fatal to the balanced English constitution of the eighteenth century, and to the religion to which they were sincerely attached. His " Reflections " helped also to teach continental sovereigns that they must abandon their selfish individualism, and unite in the statement and defence of principles which were capable of combating the principles of the revolutionists. But, though the majority of Englishmen agreed with Burke, there were many who defended the principles of the Revolution. Paine answered Burke ; and his books, and the activities of the supporters of his principles, familiarized the nation with the new democratic ideals. The new age of reform was coming to birth.[2]

In spite of Pitt's efforts, England was driven to war with France ; and the war soon developed into a long struggle with Napoleon for national existence, at the end of which England had made up for the loss of her American colonies. That struggle stopped all those projects of gradual reform which might have adapted the law and constitution of England to changed economic, industrial, and social conditions. In 1807 Romilly admitted that, owing to the influence of the French Revolution, the disposition of all classes was unfavourable to projects of sane reform.[3] Before the war ended large arrears of reform were long overdue. When it ended, the dislocation caused by the cessation of war conditions and by the heavy burden of taxation, aggravated the evils caused by laws and institutions which were

[1] E.g. Lord Lansdowne, Halévy, Growth of Philosophic Radicalism 169-170.

[2] Lytton Strachey, Characters and Commentaries 53, contrasting the letters of Walpole, Gray, and Cowper, with those of Byron, Shelley, and Keats says, " the contrast is so complete that one is tempted to believe that an intelligent reader from another planet might almost by the aid of these letters alone, infer the French Revolution."

[3] " Among the higher orders it has produced a horror of every kind of innovation ; among the lower, a desire to try the boldest political experiments, and a distrust and contempt of all moderate reforms," Memoirs ii 537 ; and the same cause prevented any reform in the Church, N. Sykes, Church and State in the Eighteenth Century 405-407.

rapidly becoming more and more unsuitable to the new conditions which the industrial revolution was creating. Many converts were gained to the new democratic principles, and proposals for sweeping reforms based on those principles began to be made. But in Parliament a new Tory party, which, in the interests of national defence, had long resisted even the smallest and sanest projects of reform, was all powerful; and the new Whig party had, by their unpatriotic conduct during the war, lost all credit with the nation. The Tories failed to realize, when the war ended, that long-delayed measures of reform ought to be taken in hand at once; and that measures of repression (however necessary) were powerless by themselves to cure the existing discontents.

In the disturbed years which followed 1815 many different minds were working at the political, social, and economic problems of the day. There were radicals, inspired by Rousseau and Paine, who advocated the sweeping reforms which their reason, inspired by these authorities, suggested to them. There were the economists who believed in the miraculous curative properties of the policy of *laissez-faire*. There were the utilitarians—the disciples of Bentham—who had much in common with the school of the economists. Both the economists and the followers of Bentham gravitated to the democratic ideas of the radical reformers, because they saw that it was only by means of the victory of their ideas that they could hope to effect the reforms which they desired—Bentham, as Maine has truly said,[1] became a radical reformer "through sheer despair." Though more enlightened counsels were beginning to make themselves felt in the Tory party in the second decade of the century, this change of heart came too late. All schools of reformers had come to realize that nothing adequate could be done without a measure of Parliamentary reform, much larger than any Tory party would concede.

At this point Irish politics came to the help of the reformers. Owing to the prejudices of George III the Union with Ireland, which had been effected in 1800, had not been accompanied by a measure of Catholic emancipation and other measures in favour of the Catholics, which were essential to its success. All attempts to secure a measure of Catholic emancipation failed till, in 1829, its concession was forced upon Parliament as an alternative to civil war.[2] That concession split the Tory party, and, in the following year the Whigs at last gained power. In 1831 the reconstituted Whig party got the support of the different schools of reformers for their project of Parliamentary

[1] Popular Government 163.
[2] Erskine May, Constitutional History ii 373-376, iii 163-172.

reform, and, with the help of the Irish members,[1] they carried it through the House of Commons. The opposition of the House of Lords was at length overcome, partly by the threat of the Crown to create sufficient peers to pass the Bill, and partly by the realization of the fact that the nation had been roused to such a pitch of enthusiasm for the Bill that the only alternative to its passage was civil war.

The new Whig party were not radical reformers—they were no followers of Rousseau and Paine. Grey wished to save as much of the old order as it was possible to save.[2] They drew their strength from the middle classes, whom their Reform Act enfranchised, and they carried into effect the political and economic ideals of those classes—reform of the law and institutions of the country on utilitarian lines, and an individualistic policy of political and economic *laissez-faire* which reduced the activity of government to a minimum, and, for that reason, had evil effects both upon the national life and, in the long run, upon its commerce and industry.[3] The famous Reform Act was a moderate measure of reform ; it fell far short of the wishes of the radical reformers ; and, as the many necessary reforms effected by the reformed Parliament were equally moderate, the law and institutions of England were adapted to the new age with a smaller break in the continuity of their history than occurred in any other state in Europe. Indeed the new Whigs, who had carried the Reform Act, delighted to compare themselves with, and to imagine that they could show an unbroken line of descent from, those old Whigs who had effected the Revolution of 1688.[4] But Burke had demonstrated that the line of descent was not unbroken.[5] In fact their claim to be the spiritual successors of the old Whigs had just about the same amount of validity as the claim of the reformed Anglican church to be the spiritual successors of the mediæval Roman Catholic church of England.

The passing of the Reform Act of 1832 was a larger break in the continuity of English institutions than any that England had experienced since the accession of the house of Tudor. It destroyed the balanced English constitution of the eighteenth century, because it made the House of Commons, not merely the most influential of the partners between whom the power of the

[1] "A majority of Irish members turned the balance in favour of the great democratic Reform Bill of 1832," Lecky, History of Ireland v 405.

[2] H. W. C. Davis, The Age of Grey and Peel 227-228.

[3] "Even if Ricardo and the Manchester School were right in thinking that a thoroughgoing acceptance of *laissez-faire* was essential, in their age, for the most rapid accumulation of material goods, it did not necessarily follow that this policy was the wisest for the personal welfare of individuals generally, or the continued maintenance of sound national life," Cunningham, Industry and Commerce iii 738.

[4] Vol. vi 67. [5] Ibid 281.

state was divided, but by far the strongest power in the state. In the House of Commons, it substituted for that representation of diverse interests, which the anomalies of the unreformed franchise had secured,[1] the representation of the single class to which a uniform franchise had given predominance; and thus it made it less possible to secure that the abler, the more prosperous, and the more responsible minority should have the predominant power in the government. It brought into clear relief the sovereignty of the Legislature; and it emphasized the power and the duty of the Legislature to give effect to the wishes of the people by actively using its powers. It increased the Parliamentary influence of those new urban centres which the industrial revolution was creating; and, by so doing, it increased the influence of the centres which the history of the French and other revolutions have shown to be the most favourable to the spread of democratic ideas. It helped to establish the idea, upon which many advocates of diverse reforms were not slow to act, that the best way of giving effect to their schemes was an extension of the franchise to ever-widening classes. And thus, although it introduced a very moderate measure of democracy, it created a set of conditions in which this moderate measure of democracy could easily be increased. In fact it set the British constitution on the broad path which leads to unmitigated democracy, and set in motion the causes which have, to a large extent, assimilated the British constitution and the democratic constitutions of the self-governing Dominions.

Rapidly changing social and economic conditions, which made the individualism and the *laissez-faire* doctrines of the Whigs and the economists increasingly inadequate to the needs of the modern state; the competition of rival political parties for power; the influence of an Irish nationalist party which was always ready to strike a bargain with an opposition which wished to gain office;[2] loose theories of the equality of men and their natural right to share in the government of the country, derived almost unconsciously from the fallacies of Rousseau and Paine—have all helped to produce those extensions of the franchise which, in less than a century from the passing of the Reform Act, have

[1] Below 565-566.

[2] "There has scarcely been a period since its enactment (the Act of Union), in which Irish questions and Irish votes have not been made the chief weapon in party conflicts; and with the appearance in the Imperial Parliament of a separate Irish party, ostentatiously indifferent to the great interests of the Empire, the evil has been immensely aggravated. . . . It has produced coalitions and alliances, to which the worst period of English party politics in the eighteenth century can afford no adequate parallel," Lecky, History of Ireland v 493; the net result has been that "their presence in the British Parliament has proved the most powerful of all agents in accelerating the democratic transformation of English politics," ibid 405.

realized the democratic ideal, by introducing a fictitious equality, which disregards alike the intellectual differences between human beings, and the intellectual and physical differences between men and women. And so in Great Britain, which, little more than a century ago, repudiated the ideas on which the French Revolution was based, and led the resistance to Napoleon, those ideas have triumphed. The British constitution and the self-governing Dominions are pure democracies—a form of government which Burke truly described as the most shameless and the most fearless thing in the world.[1] France, said Sorel, "has done more than conquer Europe: she has converted it."[2]

Sorel's dictum is true of the political history of many European countries during the nineteenth century. But in some of these countries this conversion has been transitory. Experience has shown that to entrust the determination of the policy of the state to the least capable and the poorest of its citizens is fatal both to the efficiency and the honesty of its government. There has therefore been a movement in the opposite direction, which has resulted in the establishment of dictatorships—an heroic remedy which is often as unsatisfactory as its opposite extreme has proved to be. What is really wanted is a return to a system, which was in a large measure realized in eighteenth-century England, under which the abler, the more prosperous, and the more responsible citizens have the controlling power over the government, without depriving the more ignorant and the poorer citizens of the opportunity to influence its policy.

This History closes with the coming into force of the Judicature Act in 1875, so that it is not concerned with these more recent developments. The period between 1832 and 1875 is a period which is in the main dominated by the set of Whig and utilitarian ideas held by the men who passed the Reform Act in 1832. Under their guidance, the Legislature of that period, seconded by the judges, did good work in adapting English law and English institutions to the new industrial and mechanical age. Their greatest work was the reform which they effected in all parts of the machinery of government, and more especially in the machinery of the executive government. They reformed all the departments of the executive government from top to bottom, and created a permanent civil service which is the best in the world, the abilities of which have mitigated the worst effects of the advent of a purely democratic form of government. The main defects of the statesmen who were animated by these ideas were, first, that they took so narrow and so mechanical a view of political problems that they neglected the

[1] Reflections on the French Revolution 139.
[2] L'Europe et la Revolution Française i 548.

lessons of the past, and divorced politics from human nature; and, secondly, that they believed fanatically in the merits of *laissez-faire*. For these reasons they took an inadequate view of the functions which the state ought to assume to enable it to solve the problems of this new age. At the close of this period, these defects began to be remedied by the growth of the new socialistic conception of the state, which has enlarged the list of the natural rights of citizens, and, in conjunction with and supported by a victorious democracy, threatens to curtail both rights of property and the right to personal liberty more unduly than the Whig and utilitarian and *laissez-faire* conceptions enlarged them. But, except in so far as the legislation of the period before the Judicature Acts, points the way to the beginnings of these new developments, it falls outside the scope of this History.

PART I

SOURCES AND GENERAL DEVELOPMENT

CHAPTER I

THE EIGHTEENTH CENTURY

Public Law

IN this chapter I shall deal with the development of English Public Law in the eighteenth century. The central feature of that law is the constitutional position which Parliament had won as the result of the Revolution,[1] and had consolidated as the result of the succession of the Hanoverian Dynasty in accordance with the Act of Settlement.[2] But to understand what that position was, how Parliament used it so that Parliament became the predominant partner in the constitution, and the effect of that user upon the development of English public law, it is as necessary in the eighteenth, as it was in the sixteenth century,[3] to give some account of the evolution of local government. In the later as in the earlier century, we must know something about the persons and bodies which took a large part in determining the personnel of Parliament, if we would understand its strength and its weakness, its capacities and its limitations. Not less important than Parliament is the new position which the King and the central government took in the public law of the eighteenth century, as the result of the development of the powers of Parliament. On the one hand, the need for the establishment of harmonious relations between the King and Parliament produced some new constitutional practices and understandings, in some of which we can see the germs of the system of cabinet government.[4] On the other hand, the restriction of the powers of the central government by Parliament emphasized the old standing independence of the units of local

[1] Vol. vi 243-262.
[2] Below 34.
[3] Vol. iv 180-181; vol. vi 61.
[4] Below 636-643.

government,[1] the constitutional rights of the subject,[2] and the supremacy of the law.[3] All these salient features of the public law of the eighteenth century united to create that constitution of separated powers and of checks and balances, which won the approbation of foreign publicists and was eulogized by Blackstone and Burke.[4]

These developments proceeded smoothly and continuously on the lines marked out by the Revolution settlement; and we have seen that that settlement, because it had been the work of a coalition of the Whig and Tory parties,[5] was remarkable for the smallness of the break which it had made in the continuity of the public law of the state. But there were other factors in the public law of the eighteenth century which were introducing new features, new ideas, and new problems into English public law. One of these factors was the modification of the constitution of Parliament by the Act of Union with Scotland.[6] A second factor was the relations with Ireland, the injudicious handling of which, towards the end of this period, was beginning to affect English politics in a way which was as inevitable as it was unfortunate.[7] The third and the most important factor was the expansion of England beyond the seas by the development of many colonies and the beginnings of an Indian Empire. That expansion raised many political constitutional and commercial problems,[8] and caused many new developments in English public law.[9] These new developments were already indicating in no uncertain fashion that the public law of the eighteenth century was ceasing to be the public law of England only, that English law was ceasing to be the law of a single state, and that it might one day become one of the great legal systems of the world.

The American war of independence marked the downfall of the old Colonial Empire. Its causes, its conduct, and its results showed up some of the weaknesses of the eighteenth century constitution;[10] but the recovery of England from this disaster, and the building up of a new Colonial Empire, showed even more clearly its strength, its capacity to learn from past mistakes, and the persistence of those qualities which have made Englishmen a race of colonizers and the builders of states.[11] The indirect results of the American war of independence upon England and upon Europe, united with contemporary changes in legal political and economic ideas, and with the great scientific and engineering discoveries of the age, to modify profoundly all the intellectual

[1] Vol. iv 164-166; vol. vi 59-66; below 238.
[2] Vol. vi 264-272; below 417, 646.
[3] Vol. iv 174, 188-189; vol. v 428, 493; vol. vi 262-264; below 647-649.
[4] Below 715-716, 722.
[5] Vol. vi 195.
[6] Below 41-42.
[7] Vol. xi 32-35.
[8] Vol. xi 81-107, 161-226.
[9] Vol. xi 229-274.
[10] Below 103-134, 108.
[11] Vol. xi 42.

and social bases of eighteenth-century society.[1] These developments produced a demand for legal and constitutional changes, the outcome of which has led directly to our modern world of machinery, manufactures, urban populations, and democracies.

With these modern developments I shall deal in later chapters. In this chapter I shall deal with the development of English public law down to the outbreak of the war with France in 1793. To understand this development it is necessary to bear in mind the main outlines of the political history of this period. I shall, therefore, in the first place, sketch very shortly the outlines of that history. Then I shall deal with the public law of this period under the following heads: Local Government; The Executive; Parliament; Parliament and the Executive; The Law Courts and the Liberties of the Subject; The Separation of Powers; Great Britain and Ireland, the Colonies, and India; The Merits and Defects of the Eighteenth-Century Constitution.

I

The Historical Background

The reign of Anne is one of the turning-points of English history. On the one hand, we can see in the political programmes and ideals of the statesmen of this reign, and of the parties which they led, the influence of the religious and constitutional conflicts of the seventeenth century. On the other hand, we can see emerging from the party struggles of domestic politics the new political programmes and ideals which, by creating the eighteenth-century Whig and Tory parties, will shape the course of English constitutional history and the form of English public law; and in the sphere of foreign politics, we can see the results of the prescience of William III—the definite emergence of England as the possessor of large overseas dominions, and, consequently, the continuance in a more acute form of that contest with France and Spain for commercial colonies which lasted throughout the eighteenth century.[2]

This characteristic of the reign of Anne is due to the characteristics of the Revolution settlement of 1688; and that settlement was dictated by the accidents of the domestic and foreign policy of James II's reign. Because it was made by a coalition of the

[1] Vol. xi 390-394.

[2] "The large successes of the reign of Anne, which laid the foundations of British power and prosperity in the eighteenth century, had all been foreseen and advised by the Dutch King—the Grand Alliance, the Continental war under Marlborough, the fleet in the Mediterranean, the acquisition of Gibraltar and Port Mahon, and last but not least the Union with Scotland—these were all policies that he bequeathed," G. M. Trevelyan, England under Queen Anne i 161.

two great parties in the state, it was carried through with as little change as possible in the structure and law of the state.[1] But, when the dangers to church and state which had brought about that coalition of parties had been surmounted, the deep differences between these parties reappeared. We see the old differences between the party which stressed the rights of Church and King, and the party which stressed the powers of Parliament, the constitutional rights of the subject and the supremacy of the law, re-emerging in the controversies between the Tories and the Whigs.

But they re-emerged in a different setting. The Revolution and the Act of Settlement had destroyed the old semi-sacred and supra-legal position of the King.[2] The Act of Toleration had made a small breach in the privileged position of the Anglican Church and its members.[3] The recognition of the supremacy of the law and of the independence of the judges had given a new security to the rights of the subject.[4] The refusal in 1694 to renew the Licensing Act had freed the Press from irksome restrictions,[5] and given it a *de facto* freedom which, after much controversy, was, at the end of the century, recognized by the Legislature.[6] All these events enabled the two parties in the state to develop their principles in new conditions and with a new freedom. One result was an output of political speculation and political literature, which was commented upon by contemporary observers[7] and astonished foreign critics.[8] "Of all the ways and means," says Addison,[9] "by which this political humour hath been propagated among the people of Great Britain, I cannot single out any so prevalent and universal as the late constant application of the Press to the publicity of state matters. We hear of several that are newly erected in the country, and set apart for this particular use. For, it seems, the people of Exeter, Salisbury and other large towns, are resolved to be

[1] Vol. vi 195, 261. [2] Ibid 230-231. [3] Ibid 200-202.
[4] Ibid 262-263. [5] Ibid 375-377. [6] Vol. viii 341-345; below 689-695.

[7] Thus Addison said in the Whig Examiner no. 5: "We live in a nation where at present there is scarce a single head that does not teem with politicks. The whole island is peopled with Scotsmen, and not unlike *Trinculo's* kingdom of viceroys. Every man has contrived a scheme of government for the benefit of his fellow-subjects, which they may follow and be safe"; cp. The Freeholdeer no. 53, cited Lecky, History of England i 75; and see ibid 75-76 as to the large circulation of some of this literature.

[8] Voltaire, Lettres Philosophiques no. 20 (ed. Lanson ii 119-120) says, "En Angleterre communément on pense, et les lettres y sont plus en honneur qu'en France. Cet avantage est un suite nécessaire de la forme de leur gouvernment. Il y a à Londres environ huit cent personnes qui ont le droit de parler en public, et de soutenir les intérêts de la nation: environ cinq ou six mille prétendent au même honneur à leur tour, tout le reste s'érige en juge de ceux-ci, et chacun peut faire imprimer ce qu'il pense sur les affaires publiques; ainsi toute la nation est dans la nécessité de s'instruire."

[9] The Freeholder no. 53.

as great politicians as the inhabitants of London and Westminster." Another result was the formation of many political clubs, two of the most famous of which were the Tory October Club and the Whig Kit Cat Club ; [1] and the great increase in the number of coffee-houses, many of which were appropriated to politicians of one or other party and to particular professions or trades.[2]

This new atmosphere of almost unrestrained political discussion tended to mitigate the ferocity of contending parties and sects [3]—it was something to substitute the weapons of discussion for the weapons of war. But it also tended to perpetuate the differences between the parties by defining the issues more clearly. Anne, unlike William III, was no foreign sovereign. She was the daughter of James II, and a strong supporter of the Church of England.[4] The Tories and churchmen, who formed the majority of the nation, could invest her with that semi-religious, semi-sentimental halo, which was an essential part of the royalist creed. They could revive their old ideas as to the position of Church and King, and their old doctrines of divine right, passive obedience and non-resistance, which had in effect been condemned by the Revolution and the Act of Settlement.[5] On the other hand, the Whigs found it necessary to combat these high Tory doctrines, and to re-state and defend those principles of Parliamentary government, of the rights of the subject, and of the supremacy of the law, which had triumphed at the Revolution.[6] In reality, the leaders of both

[1] Lecky, Hist. of England i 76.

[2] Some of these are enumerated by Addison in no. 1 of the Spectator : " Sometimes I am seen thrusting my head into a round of politicians at *Will's*, and listening with great attention to the narratives that are made in those little circular Audiences. Sometimes I smoke a pipe at *Child's*, and whilst I seem attentive to nothing but the *Post-man*, overhear the Conversation of every Table in the Room. I appear on *Sunday* Nights at *St. James's* Coffee-house, and sometimes join the little Committee of Politicks in the Inner Room, as one who comes there to hear and improve. My Face is likewise well known at the *Grecian*, the *Cocoa-Tree*, . . . I . . . sometimes pass for a *Jew* in the Assembly of Stock-Jobbers at *Jonathan's*."

[3] Voltaire, Lettres Philosophiques no. 5 (ed. Lanson i 61-62), says of the religious conflicts of this reign that, though Anglican intolerance was much in evidence, " il ne s'étendoit pas plus loin qu'à casser quelquefois les vîtres des chappelles hérétiques, car la rage des sectes a fini en Angleterre avec les guerres civiles, et ce n'étoit plus sous la Reine Anne que les bruits sourds d'une mer encore agitée longtemps après la tempête ; " this is partly true, but it is an exaggeration in so far as it does not take account of the Schism and Occasional Conformity Acts, vol. vi 203 ; below 47, 50.

[4] Below 38. [5] Below 38-39.

[6] Below 43-44, Sir Joseph Jekyll, in his speech on Sacheverell's Impeachment 15 S.T. at pp. 95-96, said, " My Lords, I must premise, that the Commons cannot but think it hard . . . that in this place and at this time, they should be forced to plead in vindication of the justice of the Revolution. But since we must give up our right to the laws and liberties of the kingdom, or (which is all one) be precarious in the enjoyment of them . . . if this doctrine of unlimited Non-Resistance prevails, the Commons have been content to undertake this prosecution."

parties were agreed upon fundamentals. Neither Harley [1] nor Bolingbroke [2] believed in those doctrines of divine right, passive obedience and non-resistance which made up the old royalist creed; and no Whig statesman wished to abolish the monarchy or disestablish the church. The controversy between the opposing religious sects had, as Professor Trevelyan has said, become denominational rather than religious; [3] and this change reacted on the opposing political parties.[4] But the smallness of the changes in constitutional law actually made at the Revolution had left the constitution very vague and flexible. It was thus possible for the more extreme sections of the two parties so to interpret it that it reflected their political and religious prepossessions, and thus to advocate very different lines of policy. The formation of these divergent interpretations and lines of policy was fostered by the events of Anne's reign. They accentuated the differences between the two parties, and so increased the bitterness of party strife. Towards the end of her reign it was a very open question whether the constitution would develop on Tory and Royalist, or Whig and Parliamentary lines; and if the Pretender would have abandoned his religion, or even have dissembled it, a Stuart Restoration might have been effected.[5] The prevailing political uncertainty is best illustrated by the intrigues which most of the leading statesmen of both parties carried on with the Pretender.[6]

Let us now turn to the events of the reign of Anne, and examine the reasons why, in spite of the sympathy of the Queen for the Tories, and in spite of the predominance of the Tory creed in the country, it ended in a Whig victory which, by giving the government of the country to the Whigs for half a century, finally secured the Revolution settlement, and led to the growth of a new Tory party purged of its old Jacobitism. I shall glance rapidly first at the framework of the constitution as it was settled at the Revolution; secondly at the manner in which the Queen, the leading statesmen of the day, and the parties which they led, moulded it under the pressure of the needs of foreign and domestic policy; and thirdly at the causes and the consequences of the defeat of the Tory party at the end of the reign.

[1] Below 45. [2] Below 45-46.

[3] England under Queen Anne i 283.

[4] "As in the Ireland of to-day, so in the England of Anne, although men no longer debated doctrine and ritual as the subject-matter of politics, the framework of rival political parties was formed on a confessional basis, and dislike of the smell of one's neighbour's religion seemed the prevailing passion in man as a political animal," ibid 283-284.

[5] Below 49. [6] Lecky, Hist. of England i 164-167.

(1) *The Constitution at the accession of Anne.*

It was generally recognized that the sovereign power in the constitution was the King, the House of Lords, and the House of Commons.[1] It was so generally recognized that the essence of the case for the defence on the impeachment of Sacheverell, was that the doctrines of non-resistance and passive obedience which Sacheverell had advocated, applied, not to the King, but to the legislative power in the state—that is to King, Lords and Commons.[2] Swift, in his Tract entitled "The Sentiments of a Church of England Man," not only anticipates this line of argument,[3] but also takes occasion to maintain, first that the maxim that the King can do no wrong applies only to the King in his capacity of "administrator of the supreme power"; [4] and, secondly, that a sovereign Legislature composed of these different elements is necessary to secure the freedom of a nation. Since his views on this second point are, if not the first, at least a very early statement, of a theory of the constitution which was essentially true in this century, and continued to be repeated long after it had ceased to be true,[5] I shall copy his words. He says: [6]

It is a *church-of-England man's* opinion, that the freedom of a nation consists in an absolute *unlimited legislative power,* wherein the whole body of the people are fairly represented, and in an *executive* duly *limited;* because on this side likewise there may be dangerous degrees, and a very ill extreme. For when two parties in a state are pretty equal in *power, pretensions, merit,* and *virtue* . . . it hath been the opinion of the best writers upon government, that a prince ought not in any sort to be under the guidance or influence of either, because he

[1] Vol. vi 279-280; below 526-531.

[2] Sir Simon Harcourt, who led for the defence, said, "he (Sacheverell) has, indeed, affirmed the utter illegality of Resistance on any pretence whatsoever to the supreme power; but it cannot be pretended, that there was any such Resistance used at the Revolution. The supreme power in this kingdom is the legislative power; and the Revolution took effect by the Lords and Commons concurring and assisting in it. Whatever therefore the Doctor has asserted of the utter illegality of Resistance, his assertion being applied to the supreme power, cannot relate to any Resistance used at the Revolution," 15 S.T. at p. 196; Sacheverell himself said in his defence (which was composed for him by Atterbury), "the Resistance in that passage by me condemned, is nowhere to be applied to the Revolution; nor is it applicable to the case of the Revolution, the supreme power not being there resisted," ibid at p. 366.

[3] "Many of the clergy and other learned men, deceived by a dubious expression, mistook the *object* to which *passive obedience* was due. By the *supreme magistrate* is properly understood the *legislative* power, which in all governments must be absolute and unlimited. But the word *magistrate* seeming to denote a *single person,* and to express the *executive* power, it came to pass that the obedience due to the *legislature* was, for want of knowing or considering this easy distinction, misapplied to the *administration,*" Works (ed. 1768) i 287.

[4] "The supreme power in a state can *do no wrong;* because whatever that doth, is the action of all: and when the *lawyers* apply this maxim to the *king,* they must understand it only in that sense, as he is the administrator of the supreme power; otherwise it is not universally true, but may be controlled in several instances, easy to produce," ibid 291

[5] Below 714.

[6] Works (ed. 1768) i 295-296.

declines, by this means, from his office of presiding over the *whole*, to be the head of a *party*; which, besides the indignity, renders him answerable for all public mismanagements, and the consequences of them: and in whatever state this happens, there must be either a weakness in the prince or ministry, or else the former is too much restrained by the nobles, or those who represent the people.

It is clear that in this passage Swift stresses the characteristic of the English constitution which chiefly impressed Voltaire [1] and Montesquieu,[2] and was elaborated by Blackstone [3]—the division of the sovereign power in the state between King, Lords, and Commons, and the effect of this division in checking the evils which might ensue if any one of them had unrestrained powers. In fact King, Lords, and Commons were in Anne's reign, and during the greater part of the eighteenth century, independent powers.

William III had controlled foreign policy—it was to get the control of foreign policy that he had come to deliver England from the tyranny of James II. He had vetoed legislation, and had chafed at the control, financial and otherwise, which the House of Commons exerted over him.[4] We have seen that Swift emphasizes the independent position of the prince; [5] and we shall see that Anne exercised a very considerable influence over the course of events at some of the most important turning-points of her reign.[6] In fact the Crown was responsible for the government of the country; and all through the century the Crown could command a body of persons in both Houses who were not members of either the Whig or Tory party, but supported the administration for the time being. "While," says Mr. Turberville,[7] "we are accustomed to classify all the politicians of the time as either Whigs or Tories, contemporaries knew a third division—Queen's servants.[8] Godolphin, writing to Harley in 1706, computed that the House of Commons then contained 190 Tories, 160 Whigs, and 100 Queen's servants. The last were by no means a negligible element. George III was not the first to create a party of King's friends. Familiarity with the terms Whig and Tory must not cause us to forget the older terms, Court party and Country party. The Queen's ministers could always count, not only upon politicians of the same principles as themselves, but also upon those who were for the Govern-

[1] Below 714. [2] Below 718. [3] Below 715-716.
[4] Vol. vi 253. [5] Above 31. [6] Below 37.
[7] The House of Lords in the XVIIIth Century 108-109; this was true during the whole of the eighteenth century, see Namier, England in the Age of the American Revolution 209-210; we shall see that the existence of this party, and the ideas held by it, long prevented the growth of a "formed opposition," below 637.
[8] But in times of great excitement this party tended to disappear; thus Trevelyan, England under Queen Anne iii 74, points out that in the Sacheverell election of 1708 it was much diminished.

ment, of whichever complexion it might be. Bribery by means of places was partly responsible for this state of affairs, but it was largely due also to a conviction that the Queen's Government must be carried on. Criticism of individual Ministers, attacks on particular items of policy are perfectly legitimate, but a pertinacious attempt to embarrass Administration has something of disloyalty in it. Feeling of this sort was at all times sufficient to lead some men to rally to the support of the Ministers of the day." "What matter," said Sunderland, "who serves his Majesty, so long as his Majesty is served." [1] This feeling expressed by Sunderland was more especially marked in William III's reign and the beginning of Anne's reign, when the two great parties had not as yet adjusted themselves to the new conditions created by the Revolution; and it is discernible all through Anne's reign. The influence of the Crown, the influence of the Crown's servants, and the influence of what Mr. Feiling has called "the powerful group of middle men in politics" [2]—Shrewsbury, Godolphin, Marlborough, and Sunderland—helped to control Parliament, and to give to the Crown and its servants a considerable influence in shaping the policy of the state.

The House of Lords, in legal theory "the upper House," in actual fact the less powerful of the two Houses,[3] played a very considerable and a very independent part in the constitution all through the eighteenth century. Except in matters of finance,[4] it had co-ordinate legislative powers with the King and the House of Commons.[5] Its position as a Council of the Crown,[6] and as the final court of appeal; [7] the fact that a large proportion of the great offices of the state were held by its members; [8] and the possession by its members of many privileges which indicated in no uncertain fashion their position as the members of the ruling class [9]—all helped to give the House of Lords its great constitutional position, and to make it in a sense "the nerve centre of Government." [10] In fact there was much common interest between the Crown and the House of Lords. "They were both upon the defensive from the attacks of a House which was militant, innovating"; [11] and both William III and his successors found in the House of Lords "something of the spirit of moderation," [12] induced by its hereditary character, its judicial character, and its traditions of loyalty. "The nobility," as Horace Walpole said, "are by principle more devoted to the

[1] Cited Feiling, History of the Tory Party 283. [2] Ibid 282.
[3] Vol. vi 247-249. [4] Ibid 250-251. [5] Below 626-628.
[6] Below 611-614. [7] Below 609-611. [8] Below 613.
[9] Vol. i 391; below 545.
[10] Turberville, The House of Lords in the XVIIIth Century 161.
[11] Turberville, The House of Lords in the Reign of William III 240.
[12] Ibid 241.

Crown;" [1] and "when they do not fear the Crown they will always be ready to uphold it." [2] The Earl of Ilay spoke the truth when he said in a debate in the House of Lords in 1743, that, "as the gentlemen of the other House are more particularly the guardians of the liberties of the people, so your lordships are more particularly the guardians of the prerogatives of the Crown." [3]

The House of Commons was the strongest of the three partners who shared the sovereign power in the state.[4] In spite of all the defects in the representative system,[5] it gave a true representation of the governing class in town and country. That governing class, trained by its experience in the work of local government,[6] had, and was capable of expressing, very definite views as to the conduct of the government of the state; and the power and the independence which the Revolution had given to the House of Commons, gave its members the opportunity, which they were not slow to take, of giving effect to their views. By means of the control of the House over finance it had asserted its power to inquire into all the details of the administration, and into the conduct of the King's ministers; [7] and it sometimes tried to make an illegitimate use of its powers over finance, by tacking to its bills of supply legislative measures, which it had reason to think that the House of Lords would reject.[8] By means of its power of impeachment it could secure that the King's ministers obeyed the law; [9] and, as in the case of its financial powers, it sometimes tried to extend illegitimately the weapon of impeachment, by trying to make it a means of getting rid of ministers whose policy it disliked.[10] But we have seen that, at the beginning of this period, the House of Commons had as yet hardly realized the nature of the new position in the constitution which it had attained.[11] We have seen that the Act of Settlement, which was due, somewhat as the Revolution was due, to a coalition of Whigs and a section of the Tories,[12] emphasized the old theory that the House of Commons was a body which was separate from, and a power which was a rival to, the King and his ministers.[13] And so, at the beginning of this period, though the House had secured a position of great power in the state, its insistence on preserving its complete separation from the executive government, had prevented it from continuously and regularly exercising its power, and from acquiring that sense of

[1] Memoirs of George III iv 207. [2] Memoirs of George II ii 296.
[3] Parlt. Hist. xiii 93. [4] Vol. vi 247-249. [5] Below 554-569.
[6] Vol. iv 180-181; vol. vi 61-66; below 335.
[7] Vol. vi 253-254. [8] Ibid 251. [9] Vol. i 379-385.
[10] Ibid 383-384. [11] Vol. vi 260-262.
[12] Coxe, Walpole i 9-12; Feiling, History of the Tory Party 343-345.
[13] Vol. vi 260-261, 262.

responsibility for its acts which is essential for the sane exercise of all power. It is not till the system of party government had been definitely recognized in its modern form ; [1] it is not till the system of cabinet government had begun to be developed,[2] that the House attained this sense of responsibility. In Anne's reign both these institutions were as yet inchoate.[3]

To conduct a government, the powers of which were thus divided, was a difficult task ; and the difficulty of the task was increased by the fact that the admitted supremacy of the law, and the independence of the Bench, prevented recourse to any measures which could not be justified by the letter of the law.[4] A spirit of legalism pervaded the English government both central and local, and was reflected in the attitude of all Englishmen, from the highest to the lowest, towards their rulers. From mediæval times the local government had been conducted under judicial forms ; [5] and the Rebellion and the Revolution had secured to the units of local government the right to carry out their duties freely and independently, subject only to the control of the law. Similarly the Revolution had in effect realized Coke's ideal,[6] and applied this principle of the supremacy of the law to the officials of the central as well as of the local government. This principle, at this period as in the past, easily connected itself with the legislative supremacy of Parliament [7]— indeed the legislative supremacy of Parliament, in this period as in the past,[8] was an essential corollary to it, needed to enable it to be realized in practice.[9] Addison's Freeholder said : [10]

> The House of Commons is the representative of men in my condition. I consider myself as one who gives my consent to every law which passes : a Freeholder in our Government being of the nature of a Citizen of *Rome* in that famous Commonwealth ; who, by the election of a Tribune, had a kind of remote voice in every law that was enacted. So that a Freeholder is but one remove from a Legislator, and for that reason ought to stand up in defence of those laws, which are in some degree of his own making. For such is the nature of our happy constitution, that the bulk of the people virtually give their approbation to everything they are bound to obey, and prescribe to themselves those rules by which they are to walk. . . . A Freeholder of Great Britain is bred with an aversion to everything that tends to bring him under subjection to the arbitrary will of another.

[1] Below 102, 116-118. [2] Below 636-644. [3] Below 637.

[4] The prevailing and accepted view was well expressed by Lechmere in his speech on Sacheverell's Impeachment, 15 S.T. at p. 62, "that the rights of the crown of England are legal rights, and its power stated and bounded by the laws of the kingdom ; that the executive power and administration itself is under the strictest guard for the security of the people ; and that the subjects have an inheritance in their ancient fundamental constitutions, and the laws of the land, appears from every branch of this government."

[5] Vol. iv 163-165. [6] Vol. v 428, 493.

[7] Vol. ii 441-443 , vol. v 445, 493. [8] Vol. iv 174, 186-187.

[9] Vol. ii 441 ; vol. iv 170, 172. [10] The Freeholder, no. 1.

It is easy to see that these ideas will create an independence in the face of authority, and a disposition to assert anything in the nature of a right, which will intensify the spirit of legalism prevailing in all branches of the English government. Defoe's lines in the "True Born Englishman," which I have quoted in an earlier volume,[1] is the best expression of this attitude of mind.

These two causes—the division of the powers of government between King, Lords, and Commons, and the insistence on the supremacy of the law—made the executive government, both local and central, very weak; and they continued to keep it weak all through the eighteenth century.[2] The policing of the country was the affair of the local government;[3] and, though the central government had been given statutory powers to deal with suspected traitors,[4] it had no regular body of paid servants upon which it could rely to discover treasonable plots and communications with the Pretender.[5] This made the task of a government, constantly threatened by these plots, very difficult. "When the very guard on duty at St. James's plundered houses in Pall Mall, and the civil watch was afraid to pursue the thieves beyond the doors of the guardhouse, it seems but a feeble precaution to watch coffee houses for Jacobite agents."[6]

In fact the government could only be conducted if its leaders were in agreement upon main principles of government. In William III's reign the danger of a Stuart restoration produced this agreement amongst the leaders of the nation. The fact that both Whigs and the Tories combined to pass the Act of Settlement is sufficient evidence of this;[7] and the speeches made by Sacheverell's counsel show that none of the leaders of the two great parties in the state was prepared to question the principles upon which the Revolution was based.[8] At the beginning of Anne's reign the Tories who supported the Hanoverian succession were not regarded as "whimsicals." That they came to be so regarded at the end of the reign,[9] is due to the revival, under the pressure of the events of that reign, of the historic cleavage between the Whigs and the Tories.[10] We must now consider the causes of this revival of the old party

[1] Vol. vi 61 n. 1. [2] Below 143-144. [3] Below 231-232.

[4] See 4, 5 Anne c. 8 §§ 1-3; 6 Anne c. 14; 8 Anne c. 15.

[5] W. F. Lord, Political Parties During the Reign of Queen Anne, R.H.S. Tr. N.S. xiv 69-71.

[6] Ibid 70-71. [7] Above 34.

[8] Below 44. Sacheverell himself expressly repudiated Jacobite principles: "My Lords, I have taken the Oaths of allegiance to Her Majesty, and that of Abjuration against the Pretender; and when therefore I preached the doctrine of Non-Resistance, it is most apparent that the government, which I persuaded my fellow subjects not to resist, is the present government," 15 S.T. at p. 372.

[9] Below 47.

[10] "The Tories were never less Jacobite than in 1701, just as they were never more Jacobite than in 1714," G. M. Trevelyan, England under Queen Anne i 118.

strife under new conditions, and the effects of the issue of that strife upon the future development of English public law.

(2) *Constitutional developments in the reign of Anne.*

The position which the Crown occupied in the constitution, made it inevitable that the character and opinions of the person who occupied the throne should have large effects upon the policy pursued by the state, and upon its constitutional development. The accession of Anne had immediate political and constitutional results of the first importance. Since she was able to exercise much influence upon the course of events at critical periods of a critical reign, her character and opinions played a considerable part in shaping the future course of English political and constitutional history.[1]

Anne was not a person of first-rate ability. Her mind moved slowly; and she was much under the influence of any person to whom she had given her affection—she had not, said Swift, "a stock of amity to serve above one object at a time."[2] If she had married a husband of any ability he could, through her, have exercised a very real power in the state. But her husband, Prince George, "*est-il possible?*",[3] was a man of poor health and still poorer ability—Charles II said of him, "I have tried Prince George sober and I have tried him drunk, and, drunk or sober there is nothing in him."[4] And so, in spite of the fact that she made him Generalissimo and Lord High Admiral, and induced the House of Commons to vote him £100,000 a year,[5] he is a very dim figure in English history. Of very much greater importance were her two personal attendants—Sarah, duchess of Marlborough, and Abigail Masham—who were able, through the Queen's attachment, to produce very great effects upon the course of events in her reign. But it is a mistake to suppose that she was wholly ruled by them. For, as Mr. Feiling has pointed out, "in spite of ill health, vacillation, and thoroughly second-rate ability, Anne had fixed ideals on which the ablest politicians shipwrecked."[6]

[1] W. F. Lord, Parties During the Reign of Queen Anne, R.H.S. Tr. N.S. xiv 105-106, 108-112, 118-121; Feiling, History of the Tory Party 360-362.

[2] Memoirs Relating to the Change in the Queen's Ministry, Works (ed. 1765) xii 6.

[3] So nick-named from the expression he always used when he was told any news.

[4] Macaulay, History of England chap. ix.

[5] For her attempt, which was fortunately foiled by the Dutch, to give him command of the allied troops, see G. M. Trevelyan, England under Queen Anne i 166.

[6] History of the Tory Party 361; Professor Trevelyan points out, op. cit. i 169, that "in order to do what she thought right in church and state she slaved at many details of government. And the ideas that inspired her were those of moderation, good sense, and humanity, for which the Stuart line had not always been conspicuous."

One of these ideals was a love for the Church of England as sincere as that of her grandfather Charles I. She restored to the Church the first-fruits and tenths which Henry VIII had appropriated in 1534;[1] and she tried to act fairly to all parties in the church. She was a high Anglican, and she tried in vain to induce two of the non-jurors—Ken and Frampton—to become bishops. But she also appointed the Whig Fleetwood to the see of St. Asaph;[2] and she relied much on the advice of Sharp, the Archbishop of York, "a high churchman of great piety but of equal moderation."[3] She summed up accurately her position and her policy in her speech at the close of her first Parliament. She would, she said, be careful to maintain the Act of Toleration, but "my own principles must always keep me entirely firm to the interests and religion of the church of England, and will incline me to countenance those who have the truest zeal to support it."[4] Her other ideal was to act fairly and impartially between the two great parties in the state. She did not wish to put herself under the control of a single party. Rather, her idea was, as she wrote to the Duke of Marlborough in 1707, "to encourage all those, who have not been in opposition, that will concur in my service, whether they be whigs or tories."[5] In 1710, when the Tories were triumphant, she tried in vain to induce Cowper to retain the great seal; and she consulted him and other Whigs during the years 1710-14 when the Tories were in power.[6] On her death-bed she gave the Treasurer's staff to the moderate revolution Whig, Shrewsbury—the man from whose house the invitation to William of Orange had gone in 1687[7]—and not to Bolingbroke, the leader of the extreme right wing of the Tory party.

In reality these two ideals were incompatible. Her ecclesiastical leanings raised the expectations of the rank and file of the Tory party, and led them to attempt to realize political and ecclesiastical ideals which were incompatible with the Revolution settlement. These attempts roused the fury of the Whigs and the dissenters, who saw again the doctrines of divine right, passive obedience, and non-resistance again raising their heads, and the moderate measure of toleration secured for the Protestant dissenters threatened. The war gave the Whigs power and office for a short season; but their misuse of that power, and their foolish impeachment of Sacheverell, let loose the pent-up Anglican and High Tory feelings of the nation. The Tories returned to power more embittered than ever against their

[1] 2, 3 Anne c. 11; House of Lords MSS. (N.S.) v, no. 2008.
[2] G. M. Trevelyan, op. cit. i 171.
[3] Ibid 170.
[4] Cited, Feiling, op. cit. 362.
[5] Coxe, Marlborough ii 344
[6] R.H.S. Tr. N.S. xiv 120, and the references there cited.
[7] Feiling, op. cit. 224-225.

opponents ; and many, knowing that Anne's successor under the Act of Settlement had allied himself to the Whig party, became more than half inclined to repudiate the Act of Settlement which they had helped to carry, and to support a second Stuart Restoration. In spite of all Anne's efforts to act impartially, and to be the Queen of the whole nation, the events of her reign had, by recalling the historic animosities and bitternesses of the two parties, accentuated their differences, and made her ideal impossible of fulfilment. We must now glance rapidly at these events which, by rendering permanent the existence of the Whig and Tory parties, have affected the whole future history of English public law.

The Revolution was an aristocratic, not a popular, movement. It " was shaped by a few men who were far in advance of the general sentiments of the nation." [1] Nor had its results brought prosperity. It had entailed an expensive and not very successful war ; and it had been followed by a succession of bad harvests, and consequent unemployment and famine. With the majority of the nation who hated foreigners, loved their Anglican Church, and still believed in the mysterious doctrines of divine right and passive obedience, the Dutch William, who had merely a Parliamentary title to the throne, and wished to alter the liturgy in such a way as to promote union with the Protestant dissenters, was naturally unpopular.[2] But around Anne, a daughter of the true royal line, and a devoted Anglican, all the Tory devotion to King as well as Church could find a centre.[3] The foolish recognition by Louis XIV of James II's son as King of England, had produced in William's last Parliament some revival of the Whig party and support for the King's Grand Alliance ; but in that Parliament the two parties were very equal. On Anne's accession she appointed the leading Tories to the chief posts in the administration ; [4] and in her first Parliament the Tories had a large majority.

In effect, however, the government was directed by Marlborough, the Captain-General, whose wife was the Queen's favourite, and Godolphin, the Lord Treasurer, who was one of the two best financiers of the time. They were very moderate Tories, who were pledged to the support of one of the chief planks in the Whig programme—a continental war on a grand scale with Louis XIV. But this was by no means pleasing to the bulk of their followers, who were animated by the bitterest feelings against the Whigs—feelings which they showed by the manner in which they conducted with the Whig House of Lords the disputes which arose from the case of *Ashby v. White*, *Paty's Case*, and the

[1] Lecky, History of England i 19.
[2] Ibid 19-21, 254-255.
[3] Ibid 38 ; Feiling, op. cit. 363-364, 409.
[4] Lecky, op. cit. i 39-40.

case of *The Aylesbury Men*.[1] They wished to restrict the scope of the continental war.[2] They wished, if they could not repeal the Toleration Act,[3] to minimize its effect by legislation against occasional conformity; and, as the House of Lords was opposed to this legislation, it was even proposed to tack their occasional conformity bill to the land tax bill, in order to force it through that House.[4] In these circumstances it was inevitable that Marlborough and Godolphin should come to rely more and more on the Whigs. Nor was this difficult; for Marlborough's wife was inclined to the Whig party, and his son-in-law Sunderland was one of its leaders.[5] In spite of the efforts of the High Tories,[6] the successes of Marlborough—perhaps both the greatest general and the greatest diplomatist that England has ever produced [7]—made the war popular. At the general election of 1705 the Whigs had a large majority, which they retained at the ensuing general election of 1708.

The hatred of the Tories for the Whigs was returned in ample measure by the hatred and scorn of the Whigs for the Tories. If the Tories remembered the execution of Charles I, the excesses of the Protestant sectaries at the time of the Commonwealth, the violence of the Exclusionists, the Ryehouse Plot, and Monmouth's rebellion; the Whigs remembered the way in which the dissenters had been persecuted under Charles II, the trials of Russell and Sidney, Jeffreys' bloody assize, and the popish and absolutist policy of James II. They were unable to see how, in the face of the Bill of Rights the Act of Settlement and the Act of Toleration, any honest or intelligent man could hold the beliefs about Church and King which were held by the average Tory. Addison's papers on the Tory fox-hunter fairly represent the feeling of intellectual superiority which the average Whig felt towards the average Tory; [8] and, in the case of the average Whig, that feeling of

[1] Vol. vi 271-272. [2] Lecky, op. cit. i 31-32; Feiling, op. cit. 367-368.

[3] Vol. vi 200-201.

[4] Feiling, op. cit. 368-369; Parlt. History vi 153-171, 359-367; House of Lords MSS. N.S. v xi-xiv nos. 1854, 1942; vi ii-iii no. 2067.

[5] See G. M. Trevelyan, op. cit. i 183-184. [6] Ibid 419-420.

[7] Professor Trevelyan finely and truly says of Marlborough, "the flame of his spirit served for light not heat. He stands on the threshold of the eighteenth century, one of the first-born of the age of reason, the armed champion of toleration and good sense," ibid.

[8] "For the honour of his Majesty, and the safety of his government, we cannot but observe, that those who have appeared the greatest enemies to both, are of that rank of men, who are commonly distinguished by the title of *Fox-hunters*. As several of these have had no part of their education in cities, camps, or courts, it is doubtful whether they are of greater ornament or use to the nation in which they live. It would be an everlasting reproach to politics, should such men be able to overturn an establishment which has been formed by the wisest laws, and is supported by the ablest heads. The wrong notions and prejudices which cleave to many of these Country Gentlemen, who have always lived out of the way of being better informed, are not easy to be conceived by a person who has never conversed with them," The Freeholder no. 22.

intellectual superiority was not accompanied by any of the kindly humour which takes the sting, but not the point, from all Addison's satire.[1] Moreover, to these historic and intellectual causes for mutual hatred, was added another cause. The Tories were drawn mainly from the country, and represented the landed gentry. The Whigs were drawn mainly from the towns, and represented trade and finance. The Tories believed that they were impoverished by the expense of a war of which the traders and financiers reaped the benefit.[2]

It is not surprising that the Whigs soon demanded a larger share in the administration. It is not surprising that Marlborough and Godolphin found it more and more impossible to retain a mixed ministry of moderate Tories and Whigs. The Whig Cowper became Chancellor in 1705; in 1707 Sunderland became Secretary of State; in 1708 the treasonable practices of one of the clerks in Harley's office were used as a pretext to compel his resignation; and St. John the secretary at war, and Harcourt the attorney-general, followed him into retirement. After the election of 1708 the Queen was forced to admit the remaining Whig leaders, Somers and Wharton, to office. The Whig Junto was now supreme.

During this period, while the government was in effect conducted by a coalition of Whigs and moderate Tories, one piece of legislation of first-rate importance had been passed—the Act of Union with Scotland.[3] If most of the credit for its passage must be given to the English and Scottish Whigs, and especially to Somers,[4] let us remember that the Tory Harley was one of the commissioners who treated with the Scotch, and that much of the credit for its successful passage through the House of Commons must be given to the Tory Harcourt.[5] I shall have more to say of the constitutional aspect of the Act of Union later.[6] At this

[1] The Foxhunter, on a visit to London, has his pocket picked, and "he cannot beat it out of his head that it was a Cardinal who picked his pocket, and that this Cardinal was a Presbyterian in disguise."

[2] Swift represents this point of view in his *Conduct of the Allies* and in the *Examiner*. In the *Examiner* no. 13 he says, "Let any man observe the equipages in this town, he shall find the greater number of those who make a figure, to be a species of men quite different from any that were known before the revolution, consisting either of generals or colonels, or of those whose whole fortunes lie in funds and stocks; so that *power*, which, according to the old maxim, was used to follow *land*, is now gone over to *money*; and the country gentleman is in the condition of a young heir, out of whose estate a scrivener receives half the rents for interest, and hath a mortgage on the whole. So that if the war continued some years longer, a landed man will be little better than a farmer of a rack rent to the army and to the public funds"; see Lecky op. cit. i 248-251.

[3] 5, 6 Anne c. 8; for the Act of 1704 appointing commissioners to treat for a union, 3, 4 Anne c. 7, see House of Lords MSS. N.S. vi no. 2069.

[4] Lecky, op. cit. ii 300.

[5] Feiling, op. cit. 396; Dicey and Rait, Thoughts on the Scottish Union 232-233.

[6] Vol. xi 5-10.

point we must look at its political and economic aspects. Politically it was the complement and consequence of the Revolution settlement; it was carried by the same coalition of Whig and moderate Tory statesmen as had shaped that settlement; and, without it, that settlement would have been imperilled.[1] Like the Revolution settlement, it was the work of an enlightened minority in England and Scotland,[2] and it was "the most conservative of revolutionary measures."[3] Economically it was the result of the desire of Scotland—a desire manifested by the unfortunate Darien scheme—to share in the commercial opportunities offered by the New World. Freedom of trade was conceded by England to Scotland,[4] and, in return, Scotland consented to a complete union with England, and the adoption therefore of the Hanoverian succession.[5] Politically and economically both countries gained much. England and Scotland gained security for the Revolution settlement, and Scotland gained commercial opportunities which were the foundation of her future prosperity.[6] Scotland ceased to be what Clarendon had called her in the seventeenth century, "the wilderness to the English garden,"[7] and Scottish soldiers, merchants, and colonizers soon took a leading part in the development of a Greater Britain.[8] The coalition of Whigs and moderate Tories, which carried the Act of Union, would have been impossible a few years later; and if, as Dicey has said,[9] "British statesmen had failed to seize in 1707 the one happy opportunity for carrying an Act of Union, the unity of Great Britain might well, like that of Italy or Switzerland have been delayed till the middle, and even till near the end of the nineteenth century, and the possible greatness of a British Empire might have remained the day dream of enthusiastic patriotism."

Two other useful pieces of legislation stand to the credit of this coalition ministry. First, an Act drawn by Somers for the reform of the law.[10] Secondly, a Regency Act[11] which provided

[1] Dicey and Rait, op. cit. 160-161, 163-164.

[2] Ibid 226-229; cp. Lecky, op. cit. ii 292-293, 298.

[3] Dicey and Rait, op. cit. 244-245.

[4] "The Act of Union made them free of the English Empire, which from 1707 became the British Empire, with nothing but benefit to both partners. The English Treasury indemnified the Darien shareholders, and the English Navigation Acts were extended to share with Scotland the huge monopoly they had built up," Camb. Col. Hist. i 266.

[5] Seeley, The Growth of English Policy ii. 366-371.

[6] Seeley, Expansion of England 131; Lecky, op. cit. ii 293, 300-302.

[7] Vol. vi 6. [8] Camb. Col. Hist. i 266.

[9] Dicey and Rait, op. cit. 321 n. 1; for a motion in the House of Lords for the repeal of the Union in 1713, which was defeated by Harley, see Trevelyan, England under Queen Anne iii 241-242.

[10] 4, 5 Anne c. 16; vol. xi 519-527.

[11] 4, 5 Anne c. 8; House of Lords MSS. N.S. vi no. 2179.

for the event of Anne's death, and made provisions which had the effect of ensuring obedience to the Act of Settlement.

But, when the Whigs got exclusive power, their desire to retain it, and their failure to realize the character and strength of the opposition, led them to make mistakes which ensured their defeat. That defeat was due to four main causes. In the first place, knowing that their power was secure so long as the war lasted, they needlessly prolonged it, by proposing to Louis XIV impossible terms of peace.[1] In the second place, they were blind to the strength of the Anglican feeling against a latitudinarian party which favoured dissenters [2]—a feeling which the clergy from their pulpits were exploiting to the utmost. An Act which provided facilities for the naturalization of foreign Protestants,[3] and the provisions in the Act of Union with Scotland which recognized the Presbyterian church,[4] were represented as outrages on the church of England. "The cult of the royal Martyr was shown in furious attacks on the alleged Calves Head Clubs or in dedication of churches to his name, and sermons which compared the sufferings of Whitehall to those of Calvary were rewarded by the fierce approval of Convocation, by Deaneries from the Queen, and by protests from Whig peers." [5] In the third place, they misunderstood the character of the Queen, and failed to realize the strength of her attachment to the church of England. Lastly, the violence and rudeness of the Duchess of Marlborough had destroyed the Queen's early affection for her, and she had been replaced by Mrs. Masham, who favoured Harley and the Tories.

The occasion for their defeat was the ill-judged impeachment of Sacheverell [6]—an impeachment instituted against the advice of the wisest members of the Whig party [7]—for sermons in which he had preached the high Tory doctrine of non-resistance, attacked all toleration, criticized some of the bishops and the ministers, and insinuated in no uncertain fashion that, in spite of the vote of Parliament to the contrary, the church was in danger. The Whigs who favoured the impeachment saw an opportunity of placing on record, in the most solemn manner, the political creed which underlay the Revolution settlement ; [8] and they made so skilful a use of this opportunity, that, eighty years later, Burke took the arguments of the managers of the impeachment as the

[1] Lecky, History of England i 54-59.

[2] "The anti-Church feeling that gave most vigour to the Whig party . . . was of a different order from Cromwell's. It was the nascent latitudinarianism of the new century, a feeling against priestcraft in all its forms which already appeared in not a few pamphlets and in common talk," G. M. Trevelyan, op. cit. i 53.

[3] 7 Anne c. 5 ; House of Lords MSS. N.S. viii no. 2583.

[4] 5, 6 Anne c. 8, Art. XXV.

[5] Feiling, op. cit. 409

[6] 15 S.T. 1-522.

[7] Lecky, op. cit. i 65.

[8] See Lechmere's speech 15 S.T. at pp. 61-62.

classic statement of the Old Whig creed.[1] They did not see that the impeachment gave to their opponents the opportunity of proving the enormous popularity of Sacheverell's views both in London and throughout the country; that it encouraged the Queen to get rid of ministers whom she had always disliked; and that it ensured a sweeping victory for the Tories when the Parliament was shortly afterwards dissolved.

Burke was fully justified in appealing to the speeches of the managers of Sacheverell's impeachment as the clearest statement of the Old Whig creed. But it should be noted that its interest does not stop there. Those who defended Sacheverell did not attempt to justify those high-flying doctrines of divine right, non-resistance, and the sinfulness of toleration, which were the real beliefs of Sacheverell, and probably of a large majority of Englishmen—lay and ecclesiastical. They adopted a very different line of defence. Sir Simon Harcourt maintained that the doctrine of the sinfulness of all resistance, preached by Sacheverell, was meant by him to refer to resistance to the supreme power, i.e. to Queen, Lords and Commons, and not to resistance to the Queen;[2] that when he contended for the "utter illegality of resistance on any pretence whatsoever," he was thinking of the duties of citizens in normal times, and not of extraordinary cases of necessity, such as was the case of the Revolution;[3] that he nowhere stated that the Revolution was not such an extraordinary case;[4] and that there was abundant justification for the doctrines which he had maintained in the homilies of the Church of England,[5] in episcopal statements of Anglican doctrine,[6] and in the law of England.[7] It may no doubt be said that this defence was put forward because it was the only possible line of defence which would carry weight with a Whig House of Lords. That is of course true; but it is not the whole truth. There were a large number of moderate Tories who stood by the Revolution and the Act of Settlement, who had helped to carry the Act of Union; and they saw that the high-flying doctrines of passive obedience and non-resistance rested on a semi-theological theory of legitimism and divine right which led straight to Jacobitism. It was the contest for power between these two wings of the Tory party—the moderates or "whimsicals" and the "high fliers"—which wrecked the fortunes of the party, and put their opponents in power for nearly half a century.

The leader of the moderate Tories was Harley. Harley came of a distinguished Puritan family, and he had some of the Puritan

[1] Appeal from the New to the Old Whigs, Works (Bohn's ed.) iii 45 seqq.
[2] 15 S.T. at p. 196 cited above 31 n. 2; cp. Sacheverell's address at p. 366, cited ibid.
[3] Ibid at p. 201. [4] Ibid at p. 200. [5] Ibid at pp. 203-205.
[6] Ibid at pp. 205-206. [7] Ibid at pp. 207-211.

virtues. His family life was pure, his temper was serene, and his circle of friends was large and embraced men of all parties. He was a lover of books, manuscripts, and literary men—as the Harleian collection shows. His chief vice was a love of hard drinking. He had begun his political life as a Whig; but he had become a moderate Tory, and had been accepted as the leader of his party in 1695. He was not a strong party man; but he believed in the Revolution settlement; and his object was to build up a moderate Tory party which would abandon Jacobitism, and accept that settlement as final. He was no orator; but, having been Speaker in three Parliaments, he was a master of the forms of the House, and a great Parliamentary tactician. He was a sagacious rather than a far-seeing statesman—preferring to meet the difficulties of the moment as they arose. He showed the defects of these qualities in a tendency to procrastinate and a liking for secrecy. But he never ceased to keep in view his object of creating and educating a new Tory party loyal to the Revolution and purged of Jacobitism. In this policy he saw eye to eye with the Queen, and, between 1708 and 1710, he had kept up communications with her through Mrs. Masham. When, in 1710, the Queen decided to dismiss the leaders of the Whig Junto, he became Chancellor of the Exchequer. Both he and the Queen would have liked to form a coalition ministry of moderate Whigs and Tories. He tried in vain to induce Cowper to continue as Chancellor, and Walpole continued to act as Treasurer to the Navy till January 1711. The general election of 1710 was a sweeping victory for Tories, Harley became Treasurer, and a ministry in which the moderate Tories predominated was formed.

The leader of the high Tories was Henry St. John—one of the most brilliant leaders that the Tory party has ever had. His lineage was aristocratic, and his personal beauty and charm were as remarkable as his eloquence and his literary gifts. "The greatest young man I ever knew," wrote Swift to Stella in 1711,[1] "wit, capacity, beauty, quickness of apprehension, good learning, and an excellent taste; the best orator in the House of Commons, admirable conversation, good nature, and good manners; generous and a despiser of money. His only fault is talking to his friends in way of complaint of too great a load of business, which looks a little like affectation; and he endeavours too much to mix the fine gentleman, and a man of pleasure, with the man of business." In 1701-2, when he was only twenty-two, he became a member of Parliament, and attached himself to the right wing of the Tory party, to which he remained faithful throughout his long life. Though a sceptic in religion and an

[1] November 3 1711, Works (ed. 1814) ii 395.

accomplished rake, he was accepted as the leader of the high Tory and Anglican party. He made himself the spokesman of all the prejudices against the House of Hanover, and so became, as Bagehot has said, " the eloquent spokesman of many inaudible persons." [1] At twenty-five he was Secretary at War, and by far the best debater in the House of Commons. In that House, he tells us " my reputation was very high. You know the nature of that assembly : they grow, like hounds, fond of the man who shews them game, and by whose halloo they are used to be encouraged." [2] When Harley resigned in 1708, he followed his leader into retirement. He became Secretary of State in 1710 when the Tories returned to power.

The first task of the new ministry was to make peace. After a long negotiation peace was finally made in 1713 by the treaty of Utrecht.

Bagehot, writing in 1863, said, " our grandfathers and their fathers quarrelled for two generations as to the peace of Utrecht."[3] This is not surprising, since that treaty is, for the two following reasons, one of the most important landmarks in the history of the British Empire.[4] In the first place, the overseas possessions acquired by England [5] put England into the foreground of the commercial and colonizing powers of Western Europe. Secondly, and consequently, as the Dutch and Spanish powers declined, it left England and France as the two protagonists in the struggle for the control of the new Eastern and Western Worlds.[6] That struggle is the dominant note of English political history in the eighteenth century ; and because the treaty of Utrecht set the lists for the struggle, it is true to say that " no Treaty between civilized states has ever embodied more challenge to war." [7]

In the negotiations for the treaty St. John took the leading part. Though its terms were probably the best that could be got by negotiators who showed themselves unduly eager for peace,[8] the manner of its conclusion admits of no defence. We not only negotiated behind the back of our allies [9] but withdrew the British troops from the front, and betrayed the military secrets of Prince Eugene to the French.[10] Moreover we abandoned to the vengeance of the King of Spain his Catalan subjects

[1] Biographical Studies 169. [2] Letter to Windham, Works i 13.
[3] Biographical Studies 157.
[4] Seeley, Expansion of England 131-132.
[5] Gibraltar and Port Mahon which gave the control of the Mediterranean, St. Christopher, Newfoundland, Hudson Bay, Nova Scotia, the Asiento, i.e. the right of supplying the Spanish colonies with slaves, and the right to send one ship a year to trade with the Spanish West Indies, see Camb. Col. Hist. i 328, 336, 523.
[6] Seeley, Expansion of England 126-127.
[7] Camb. Col. Hist. i 301. [8] Acton, Lectures on Modern History 263.
[9] Lecky, op. cit. i 128-132, 138-141.
[10] Trevelyan, England under Queen Anne iii 90.

whose resistance we had encouraged.[1] Naturally the Allies were indignant, and among the indignant allies was the Elector of Hanover. Naturally also the manner in which the treaty had been negotiated, drew the Tories closer to the French and Jacobite party, who aimed at a Stuart restoration, and the Whigs closer to the supporters of the Elector of Hanover and the Act of Settlement.[2] The Whigs were so frantic with indignation that they allowed Nottingham to pass his Occasional Conformity bill in return for his vote against the treaties,[3] and, worse than all, they supported and nearly succeeded in carrying a motion to repeal the Act of Union[4]—a measure almost as necessary to the success of their cause as the Act of Settlement itself. But the government stood firm; and Swift's *Conduct of the Allies*, which was revised by St. John, skilfully maintained the justice of the treaty. But it was only forced through the Lords by the expedient of swamping the hostile Whig majority by the creation of twelve Tory peers. The peace, it was generally felt, was not creditable; the commercial clauses, which were intended to encourage trade with France,[5] and thus to give effect to the wishes of that group of Tory economists who advocated a freer trade, with the object of securing a greater volume of exports and imports and a greater customs revenue,[6] were rejected; and it soon became apparent that Harley and the moderate Tories were at variance with St. John and the high Tories.

St. John's spectacular gifts of person and intellect assorted ill with Harley's cautious secretive and procrastinating temperament. His loose morals were a contrast to Harley's regular family life. His liking for visionary ill-digested schemes, and for speedy and rash decisions, was directly opposed to Harley's empirical statesmanship. He had made himself the leader of the right wing of the Tory party, whilst Harley was the leader of the "whimsical" or Hanover Tories. The final cause of disagreement between the two leaders was the fact that Harley had been created Earl of Oxford, while he had had to content himself with the lower title of Viscount Bolingbroke. He attributed this disappointment to Harley's jealousy; "and freely told me," says Swift,[7] "that he would never depend upon the Earl's friendship as long as he lived, nor have any further commerce with him, than what was necessary for carrying on the public service." In fact this was the culminating point in a series

[1] Lecky, op. cit. i 156-158. [2] Trevelyan, op. cit. iii *ix*, 248.
[3] Feiling, op. cit. 443; 10 Anne c. 2; Parlt. History vi 1045-1046.
[4] Feiling, op. cit. 449; Parlt. History vi 1216-1219.
[5] Lipson, Economic History of England iii 106-107.
[6] Vol. vi 339-340; cf. Lipson, Economic History of England iii 109-111.
[7] An Inquiry into the Behaviour of the Queen's Last Ministry, Works (ed. 1768) xii 58-59.

of disagreements, both political and temperamental, which the characters of the men and the state of political parties rendered inevitable. Bolingbroke was as good as his word. He never rested till he had ousted Oxford, and, to the end, he attributed the downfall of the Tory party to the defects of Oxford's leadership.

From the outset the ministry had been embarrassed by the size and character of their majority. The Queen and the moderate Tories did not want to break entirely with the Whigs. The high Tories wanted revenge on the Whigs. They still wished to revive all their old grievances, and to minimize the Toleration Act by legislation against the dissenters. In order to put pressure on the ministry to carry out this programme they had formed the October Club. Bolingbroke and Oxford, so long as they were acting together, had managed to keep these ardent members of the party in some sort of control.[1] But, when they quarrelled, Bolingbroke became the leader of the high Tories. Thus the breach between the two sections of the Tory party became irreparable ; and it became irreparable just at the time when the question of the succession to the throne had become the all-engrossing political question of the day, because upon its issue depended not only the future of the two political parties in the state, but the whole future of the British constitution.

It was clear that Anne could not live long. It was clear that by the law of the land the Elector of Hanover was the next heir to the throne. It was clear that the Elector was firmly attached to the Whig party. This situation was a difficult one for Oxford who had helped to pass, and had no thought of setting aside, the Act of Settlement. He favoured the policy of coming to an understanding with the Whigs, and of ruling by a coalition, as at the beginning of the reign. Bolingbroke in his later years admitted that this was the right policy, and that he had helped to frustrate it.[2] In fact the policy which he and the high Tories pursued was making such a coalition more and more impossible.

[1] Swift says, " I was then of opinion, and still continue so, that if this body of men could have remained some time united, they would have put the crown under a necessity of acting in a more steady and strenuous manner. But Mr. Harley, who best knew the disposition of the queen, was forced to break their measures ; which he did by the very obvious contrivance of dividing them among themselves, and rendering them jealous of each other. The ministers gave everywhere out, that the October-club were their friends, and acted by their directions ; to confirm which Mr. Secretary St. John . . . publicly dined with them at one of their meetings. Thus were eluded all the consequences of that assembly ; although a remnant of those who conceived themselves betrayed by the rest, did afterwards meet under the denomination of the March-club," Memoirs Relating to the Change in the Queen's Ministry, Works xii 23-24.

[2] State of Parties at the Accession of George I (ed. 1752) 265-266 : " The two parties were in truth become factions in the strict sense of the word. I was one, and I own the guilt."

Oxford continued to negotiate and to procrastinate ; [1] and his natural tendency to procrastinate, increased perhaps by ill-health and advancing years, was aggravated by the difficulty of getting the Queen to assent to any proposals.[2] In fact the situation had got beyond the powers of his somewhat hand-to-mouth statesmanship—it was in fact no time for a leader who " disbelieved in the whole scheme of party, and would not frame a rigid programme." [3] His utterances become more and more enigmatic, and his drinking habits grew upon him as his difficulties increased. The Queen complained that he became more and more unintelligible, and that he was drunk in her presence.[4]

Bolingbroke saw that it was no time for such a policy of drift. The Whigs and the Hanoverians were drawing together. Hostility to the peace, and suspicion, which we now know to be well founded,[5] that the Tories were no friends to the Protestant succession, were bonds of union of which the Whigs took full advantage. " The whigs desired nothing more than to have it thought that the succession was theirs. . . . The Jacobites insinuated industriously the same thing ; and represented that the establishment of the house of *Hanover* would be the establishment of the whig party." [6] Meanwhile, " not a step was made . . . towards fortifying and establishing the Tory party ; towards securing those who had been the principal actors in this administration against future events." [7] The great difficulty was to decide what steps ought to be taken. The way would have been clearer if the Pretender would have changed, or even if he would have dissembled, his religion. But he had made it clear that he would pursue neither of these courses. Bolingbroke saw that the only possible course was to put the Tories in such a position that they could dictate terms to any successor :

> The view of those amongst us who thought in this manner was to improve the queen's favour, to break the body of the Whigs, to render their supports useless to them, and to fill the employments of the

[1] Bolingbroke says, " in this state of confusion and distress, to which he had reduced himself and us, you remember the part he acted. He was the spy of the Whigs, and voted with us in the morning against those very questions which he had penned the night before with Walpole and others. He kept his post on terms which no man but he would have held it on, neither submitting to the queen, nor complying with his friends. He would not, or he could not act with us, and he resolved that we should not act without him as long as he could hinder it," Letter to Windham, Works i 23-24 ; this is, it is true, the verdict of a personal enemy ; but it probably represents the effect of the balancing policy still pursued by Oxford at a time when such a policy was impossible ; cp. Feiling, op. cit. 452, 461.

[2] " That fatal irresolution inherent in the Stuart race hung upon her," Letter to Windham 25 ; and Swift agrees, An Inquiry into the Behaviour of the Queen's Last Ministry, Works xii 69-70, 88 ; cp. Feiling, op. cit. 361.

[3] Ibid 334.

[4] Ibid 461.

[5] Trevelyan, England under Queen Anne iii 248, 336-340.

[6] Bolingbroke, State of Parties at the Accession of George I 270.

[7] Bolingbroke, Letter to Windham, Works i 23.

kingdom down to the meanest with Tories. We imagined that such measures, joined to the advantages of our numbers and our property, would secure us against all attempts during her reign; and that we should soon become too considerable, not to make our terms in all events which might happen afterwards: concerning which to speak truly, I believe few or none of us had any very settled resolution.[1]

To pursue this policy with success Bolingbroke must retain the support of the Anglican and high Tories, and he must induce the Queen to dismiss Oxford.

He retained the support of the Anglicans and high Tories by adopting their ecclesiastical programme. Just as the Whigs had purchased the support of some of the Anglican party in the House of Lords by not opposing the Occasional Conformity Act,[2] so Bolingbroke increased his hold of his party by an Act requiring a member of Parliament to have an estate in land of £600 a year for a knight of the shire, and £300 a year for a burgess;[3] by supporting the Schism Act[4] and other even more impolitic projects,[5] by repealing the Act for the naturalization of foreign Protestants,[6] and by a salutary Act which secured some protection for the episcopal clergy in Scotland.[7] But he could do little more while Oxford held office. With the help of Mrs. Masham, who had turned against Oxford, the Queen was at last persuaded to dismiss him. But it was too late. The Whig peers Argyll and Somerset attended, possibly unsummoned, at the famous meeting of the Council[8] held while Anne was on her death-bed; and on the unanimous advice of the Council the dying Queen handed the Treasurer's staff to Shrewsbury[9]—the statesman who was most closely identified with the Revolution of 1688.[10] Summonses were immediately afterwards sent out to all Privy Councillors. "The Earl of Oxford was removed on Tuesday: the Queen died on Sunday. What a world is this! and how does fortune banter us!" These well-known words of Bolingbroke's letter to Swift

[1] Letter to Windham, Works i 9-10; this was the policy which Swift favoured: "If we consider the dispositions of England at that time, when almost the whole body of the clergy, a vast majority of the landed interest, and of the people in general, were of the Church party; it must be granted that one or two acts, which might have passed in ten days, would have put it utterly out of the power of the successor to have procured a House of Commons of a different stamp, and this with very little diminution to the prerogative; which acts might have been only temporary." An Inquiry into the Behaviour of the Queen's Last Ministry, Works xii 85-86.

[2] Above 47. [3] 9 Anne c. 5.

[4] 12 Anne St. 2 c. 7; the Queen died on the day the Act was to have come into operation, see Lecky i 258-259.

[5] Such as a bill to resume the old Scottish episcopalian revenues now in the hands of the Kirk, Feiling, op. cit. 471.

[6] 10 Anne c. 5. [7] 10 Anne c. 7; Lecky, op. cit. ii 286-291.

[8] See below 476 for the constitutional significance of these events.

[9] For the formal record of this famous meeting of the Council see Camb. Modern History v 476; Trevelyan, op. cit. iii 308-309.

[10] Above 38.

show how quickly and how keenly he realized that the Tory party had lost its opportunity. The law took its course; George I was proclaimed King of England; and the Whig party entered upon its long lease of power.

It has long been a commonplace among the Whig politicians that the Tories wished to repeal the Act of Settlement; and the correspondence of Oxford and Bolingbroke with France shows that this accusation was true—at any rate with respect to Bolingbroke.[1] This correspondence was then and long after unknown. But the events of the last four years of Anne's reign, and especially the policy pursued by Bolingbroke, convinced many that there was a design to bring in the Pretender. It was obviously to the advantage of the Whigs to exploit this feeling, to convince the new dynasty that their opponents were Jacobites at heart, and that they were the only section of the English people on whose loyalty it could rely. They did not miss their opportunity. The Whig case was very skilfully presented to George I by Cowper—Lord Chancellor in Godolphin's ministry from 1705 to 1710, and again during the first four years of George I's reign.[2] He presented to the King what he was pleased to call "An Impartial History of Parties,"[3] in which he traced the history of the Whigs and Tories from the time of the Exclusion controversy of Charles II's reign.

Throughout this tract Cowper insinuates that, since the Revolution, the Whigs had pursued a policy which was both patriotic and successful, and that they alone were unfeignedly loyal to the Revolution settlement and the Protestant succession. The glorious victories of Anne's reign were due to the Whigs. The disgraceful peace which restored the power of France, and therefore the hopes of the Pretender, was due to the opposite party, which had ever "decried all right to the crown but what was purely hereditary."[4] He could not indeed deny that the Tories had helped to pass the Act of Settlement; but he insinuated that they had only done so for fear of losing the King's favour; and he asserted that it was due to them that the Act was clogged by restrictions on the royal power.[5] He assured the King that, from his own Parliamentary experience, he could truly say "that the Whigs would venture all to support the Protestant succession in your Majesty's family; on the other hand, that many of the Tories would rejoice to see the Pretender restored . . . that the best of them would hazard nothing to

[1] Trevelyan, op. cit. iii 248, 336-340; Swift denied the accusation, An Inquiry into the Behaviour of the Queen's late Ministry, Works xii 72-74; but he was blind to the Jacobite leanings of his party, Trevelyan, op. cit. iii 100, 275, 285.

[2] For Cowper's career see vol. xii 195-201.

[3] Printed in Campbell, Lives of the Chancellors iv 421-429.

[4] At p. 426. [5] At p. 425.

keep him out . . . ; but that if ever he should declare himself a Protestant . . . they would greedily swallow the cheat, and endeavour by all possible means to put in practice again their old notions of divine, hereditary, and indefeasible right, by a restoration of the person in whom by their opinion that right is lodged." [1] He told the King, truly enough, that the power of the two parties was very evenly balanced, and that his royal influence gave him such power that, without breaking the law, " 'tis wholly in your Majesty's power, by showing your favour in due time (before the elections) to one or other of them, to give which of them you please a clear majority in all succeeding Parliaments." [2] Cowper's pamphlet was entirely successful. " The grief of my soul is this," said Bolingbroke when he was dismissed, " I see plainly that the Tory party is gone." [3] He spoke the truth. Both George I and George II were convinced of the loyalty of the Whigs and the disloyalty of the Tories. They supported the Whigs with all the weight of the prerogative, and gave them the clear majority for which Cowper had asked in all the Parliaments of their reigns.

Cowper's pamphlet told more of the truth than he could then prove. But though many of the members of the Tory party, and some of their leaders, would have welcomed a Jacobite restoration, it was not true that all the Tory party held these views—there was a party of Hanoverian Tories. But it was to the Whig interest to neglect this distinction ; and Cowper's pamphlet helped to make George I believe that all the Tories were Jacobites in disguise, and to induce him to pursue a policy of revenge, which made many of the Tories sympathise with the cause of the Pretender in 1715.[4] The taint of Jacobitism, thus attached to the Tory party, long clung to it, and excluded it from power for half a century. What were the reasons why a party, which in 1714 commanded a majority in the House of Commons and the nation, was so completely defeated ?

(3) *The causes and consequences of the defeat of the Tory party.*

The causes for the defeat of the Tory party may be summed up as follows :

In the first place, it was due to what we may call the accidents of history. If Anne had lived a few years longer, or if the Pretender had changed or pretended to change his religion, the past

[1] At pp. 427-428 ; another very clear statement of what we may call the official Whig position was made by Lechmere in his speech on the impeachment of the rebel lords in 1716, Parlt. Hist. vii 227-232.

[2] At p. 429. [3] Cited Lecky, op. cit. i 281.

[4] Bolingbroke, Letter to Windham, Works i 31 ; Lecky, History of England i 282.

mistakes of the party might have been corrected, and the party reunited. In the second place, it was due to the feuds in the Tory party. Those feuds were, to some extent, the inevitable consequences of the Revolution. The church and high Tory wing, because it believed in the doctrines of divine right and non-resistance, necessarily looked on the Protestant succession as something like a shameful event, forced on it by the Roman Catholicism of the rightful heir to the throne. Therefore it tended to fall apart from the left wing which, equally with the Whigs, believed in the expediency of the Protestant succession. To some extent these feuds were due to the quarrel between Oxford and Bolingbroke, and more especially to the brilliant but ill-balanced leadership of Bolingbroke. His conduct of the peace negotiations, and his encouragement of the church and high Tory doctrines, in which he did not believe, wrecked his party. In the third place, the Whigs were as a party better led, more enlightened, and more modern. In their party there was no large "tail," which clung to outworn political theories discarded by their leaders. The contrast between the October Club and the Kit Cat Club is the best proof of this fact. "The October Club was an assembly of young Tories bent on noisy revels." "The Kit Cat Club was really a social assembly of the leaders and many members of the Whig party. It was a sort of permanent joint committee of the party in the two Houses, meeting regularly to concert political measures in an informal manner. Such excellent organisation and such excellent material could not fail of success. The party struggles of 1710-1714 were the conflicts of an undisciplined force ill provided and badly led against a regular army in perfect training."[1] Lastly, the letter of the law was on the side of the Whigs; and, in the disorganized state of the Tory party, that gave them an enormous advantage. Moreover, when George I has succeeded to the throne, they had the whole force of the Crown on their side. The reign of Anne had shown what great advantages that gave.[2] Cowper was quite right when he said that the Crown had the power "without the least exceeding the bounds of law" to give to the party which it favoured "a clear majority in all succeeding Parliaments."[3]

The most beneficial consequences of the defeat of the Tory party, and the long rule of the Whigs, were the final extinction of the old doctrines of divine right and non-resistance, the acceptance by the nation of the Revolution settlement, and, consequently, the preservation amongst the states of Europe, in

[1] Lord, Parties during the Reign of Queen Anne, R.H.S. Tr. N.S. xv 117; cp. Trevelyan, England under Queen Anne i 194-195.

[2] Above 37. [3] Above 52.

which the prevailing type of government was absolute monarchy, of one state in which the monarchy was limited and in which the law was supreme. But these great advantages were secured, like all great advantages, at a price. The price was the victory for the time being of those somewhat narrow contractual and utilitarian theories of the state, and that opportunism in politics, which were characteristic of the Whig political theory;[1] and the consequent elimination for a time of "those lasting conceptions of English politics—the divinity of the state, the natural sanctity of order, the organic unity of sovereign and people, and the indisputable authority attaching to the work of time."[2] During the long exclusion of the Tories from power a new Tory party was built up, which accepted, as fully as the Whigs, the Revolution settlement, and yet preserved these larger and more humanistic conceptions, which have always been beyond the comprehension of Whig politicians of the straiter sort. The building up of such a party as this had been the main object of Harley's cautious statesmanship; but the heated political atmosphere of Anne's reign, and the feud between himself and Bolingbroke, had prevented its accomplishment in his days. Its accomplishment, during the second quarter of the eighteenth century, was due in no small degree to Bolingbroke,[3] whose political philosophy in his later years in many respects anticipates the political philosophy of Burke. Bolingbroke's religious scepticism, and the fact that he was identified with the high Tories, while Burke always called himself a Whig, caused Burke to speak slightingly of him. Yet it is nevertheless true, as Mr. Sichel has shown, that there is such an affinity between their political philosophy, that it may be said that Bolingbroke prepared the way for the greatest of all the teachers of the essential truths of the Tory creed.[4] Bolingbroke thus atoned for those earlier errors which had helped to bring his party so low; and, at the end of his life, he was conscious that he had both erred and atoned. In the epitaph which he composed for himself he combines a bare statement of the facts of his earlier, and a claim for the work of his later, career—"in the reign of Queen Anne Secretary of War, Secretary of State and Viscount Bolingbroke:

[1] Vol. vi 289. [2] Feiling, op. cit. 493; vol. vi 289-290.

[3] See Feiling, op. cit. 482.

[4] Bolingbroke and his Times ii chap. xi. Mr. Sichel has pointed out that, though Burke depreciated Bolingbroke, there is an intellectual affinity between them, and that the new Toryism taught by Bolingbroke in his later career is the basis of Burke's political philosophy; see the comparison between Bolingbroke's views, and those set forth in Burke's Appeal from the New to the Old Whigs; see also Bolingbroke's views on the functions, duties, and organization of an opposition in his essay on The Spirit of Patriotism, Works vii 59-60 cited Sichel, op. cit. ii 259; and see H. W. C. Davis, The Age of Grey and Peel 10-12 for Burke's views as to the functions of an opposition.

In the days of King George the First and King George the Second something more and better." When he suggested this contrast between his two careers he passed a substantially just judgment upon his life's work.

The succession of the House of Hanover, the victory of the Whig party, and the retention of power by that party for half a century, are three facts which have had a very direct influence on the development of English public law in the eighteenth century, and, through that influence, on its development in the nineteenth century. The most salient features in the history of English public law during these fifty years of Whig supremacy are the development of a system of Parliamentary government in which King, Lords, and Commons were really partners (though not partners on equal terms) in the work of government,[1] the development of a system of party government,[2] and the beginning of the system of cabinet government.[3] The evolution of these salient features of English public law was principally due to the position in which the Whig party found itself at the accession of George I, and to the means which it took to organize its position and to perpetuate its power. I must therefore say something of these matters before I deal with the leading events in the history of the fifty years of Whig supremacy.

The Whig party was essentially an aristocratic party. Till the reign of George III it generally had a majority in the House of Lords, in spite of the creation of twelve Tory peers in 1712.[4] But the English aristocracy, whether Whig or Tory, has always been an aristocracy whose pride it is to serve the state in many capacities—in Parliament, in the great executive offices of state, in the army and navy, in the local government ;[5] and it has never been a close body. A career was always open to talent. Successful lawyers brought new blood into the House of Lords ;[6] and, though connection with a noble family gave many advantages,[7] all through this period new men rose to the highest places in the state.

> The names of Somers, Montague, Churchill, Addison, Craggs, and many others will at once occur to the reader, and [Walpole] the most powerful leader of this age was a simple country gentleman . . . who was so far from allowing himself to be the puppet of any one, that one of the chief faults of his administration was his extreme reluctance to part with the smallest share of the influence of the Government.[8]

[1] Below 627-628, 637-641. [2] Below 102, 116-118. [3] Below 636-643.
[4] Lecky, History of England i 213. [5] Below 624.
[6] Below 605-606. [7] Below 613-614, 617. [8] Lecky, op. cit. i 229.

That the Whig aristocracy was especially marked by those liberal characteristics is due to the fact that, though many of its members were large landowners, it was not upon the landowning class alone that they relied for their power. At the beginning of George I's reign the majority of the landowners were Tories. The Whigs drew their support both from the more progressive commercial classes, and from men of sufficient independence of mind to be dissenters from the national church.[1] The wealth of the commercial classes was beginning to create a source of influence which rivalled the influence of the landowners; and the growth of new forms of property, in the shape of stocks and shares in the national debt and the great commercial companies, was regarded with jealousy by the landowners, both because it gave many persons an interest in the permanence of the Revolution settlement, and because it added to the influence of the commercial men.[2] Since many of these commercial men were dissenters, this jealousy of the new commercial wealth tended to combine with the inherited antipathy of the churchmen for all forms of belief outside the pale of the Anglican church.

The Whig aristocracy included a large part of the best intellect of the nation. It included men who were in touch with the most modern political, economic, and scientific ideas; men whose outlook was towards the ideas of the future, and not to the theological and royalist ideas of the past. And since England, from the sixteenth century onwards, has known no impassable class barriers,[3] there was a constant tendency towards an intermixture of the more conservative landed and the more progressive mercantile classes.[4] This made for the gradual permeation throughout the nation of the more modern ideas for which the Whigs stood; and, conversely, since the landed gentry, except in one or two of the larger towns, controlled the local government,[5] and formed the majority in the two branches of the Legislature,[6] their ideas and prejudices modified in some respects the outlook of the Whigs. The control which the peers and large landowners exercised over the constituencies ensured a similarity in the personnel of the two Houses;[7] and so in the eighteenth century, the governing classes, represented in those Houses, formed a small and exclusive society, with many common features,

[1] Lecky, op. cit. i 233-248, 252-259. [2] Ibid 248-251; above 41.

[3] Vol. iv 403-404, 407.

[4] Lecky, op. cit. i 241; in 1742 Hume said, Essays (ed. 1875) i 130, "there has been an attempt in England to divide the *landed* and *trading* part of the nation; but without success. The interests of these two bodies are not really distinct, and never will be so, till our public debts increase to such a degree, as to become altogether oppressive and intolerable."

[5] Below 238-239.

[6] Below 556-559, 562; cp. Namier, Structure of Politics i 5-6.

[7] Below 557.

and with all the characteristics of such a society. As Bagehot has said : [1]

> The London of the eighteenth century was an aristocratic world, which lived to itself, which displayed the virtues and developed the vices of an aristocracy which was under little fear of external control or check ; which had emancipated itself from the control of the crown ; which had not fallen under the control of the *bourgeoisie ;* which saw its own life, and saw that, according to its own maxims, it was good. . . . The aristocracy came to town from their remote estates—where they were uncontrolled by any opinion or by any equal society, and where the eccentricities and personalities of each character were fostered and exaggerated—to a London which was like a large county town, in which everybody of rank knew everybody of rank, where the eccentricities of each local potentate came into picturesque collision with the eccentricities of other local potentates, where the most minute allusions to the peculiarities and careers of the principal persons were instantly understood, where squibs were on every table, and where satire was in the air.

These influences, which were making themselves felt all through the eighteenth century, and especially during Walpole's long administration,[2] modified the bitterness of party differences, and so helped to make Parliamentary government on party lines possible.

But, when George I came to the throne, the causes which brought about these results were only just beginning to operate. The events of Anne's reign, and the victory of the Whigs, had increased the enmity between the Whigs and Tories. Since the Tories were probably a numerical majority of the nation, it was necessary for the Whigs to organize their resources in order to consolidate the victory which they had won, and to provide for the maintenance of their power.

We have seen that the state of the representative system, and the venality of many members of Parliament, gave to both the parties in the state and to the Crown many opportunities of manipulating the personnel of the House of Commons and the votes of its members.[3] Both parties made full use of their opportunities ; and in this enterprise the superior organization of the Whigs,[4] and their connection with the commercial men,[5] gave them an advantage. Many writers of the beginning of this century commented on the fact that the great merchants and the large mercantile corporations were buying up boroughs, and so eliminating the political influence of the landowners who had formerly controlled them. " Boroughs," it was said, " are rated in the Royal Exchange like stocks and tallies ; the price of a vote is as well known as of an acre of land, and it is no secret who

[1] Literary Studies i 235-236.
[2] Below 68-73.
[3] Vol. vi 246-247.
[4] Above 53.
[5] Above 41.

are the moneyed men, and consequently the best customers." [1] During these years of Whig rule a complex but efficient system of Parliamentary influence was built up, and, by the expenditure of much money and labour, it was maintained at full strength.[2] But this was a game at which both the parties in the state could play. The Tory party organized itself on the same lines as the Whig party; and, if the power of the Whigs had rested merely upon their party organization, they would not have retained it so long. The reason why they were able to exclude the Tory party so long from power was the fact that, during the reign of the first two Georges, they could command the whole influence of the Crown. We have seen that Cowper had told George I that the Crown could give the party which it favoured "a majority in all succeeding Parliaments." [3] As Mr. Namier has said,[4] "The only permanent election organization on an extensive scale centred in the Treasury, with certain supplementary resources in the Admiralty and in some minor offices." Both George I and George II used their influence in favour of the Whigs because they were firmly persuaded that their continuance on the throne depended on their maintenance in power. This was the final and effective cause of the consolidation of the power of the Whig party, because in this way the influence of the Crown was added to the influence of the Whig magnates and their supporters.[5]

We have seen that in Anne's reign the influence of the Crown was considerable; [6] and, though the disappearance of theories of divine right modified the sentiments with which men regarded the King,[7] his influence on the government of the country was not diminished under the first two Hanoverian Kings.[8] The party of the King's servants during both these reigns was as much in evidence as in the reign of Anne,[9] it swelled the majority of the Whig party, and it helped it to carry its measures both in the House of Commons and the House of Lords.

In the House of Commons it was always possible to use the numerous office holders in the House to secure a majority. The motives which actuated this set of men were expressed with unconscious felicity in the verses written at the end of his life by

[1] Cited Lecky, op. cit. i 251; cp. Trevelyan, op. cit. iii 109-110.
[2] Below 577-584. [3] Above 52.
[4] England in the Age of the American Revolution 161.
[5] "It is essential in reading the Duke of Newcastle's papers, to keep in mind . . . his two different sources of authority—his broad acres, and his position for so many years as First Lord of the Treasury," Turberville, The House of Lords in the XVIIIth Century 475; cp. Namier, Structure of Politics i 13, who points out that, at the close of a life devoted to electioneering, "the total number of seats to which he could nominate was about twelve, and even in some of these his influence was mainly personal."
[6] Above 37. [7] Lecky, op. cit. i 274-275.
[8] Below 61-62. [9] Above 32-33.

Bubb Dodington,[1] the son of an apothecary, who, by reason of his electoral influence, obtained a peerage and became Lord Melcombe. In the House of Lords similar influences could be brought to bear; [2] and, as the close family connections of the peerage produced a tendency to split into rival family groups,[3] the Crown was able to increase its influence by playing upon these rivalries.[4] Moreover, other and more direct influences could be brought to bear upon that House. We have seen that Anne had created twelve Tory peers in order to get the consent of the House to the Treaty of Utrecht.[5] The Scottish peers, whose numbers and poverty were the subject of Swift's satire,[6] gave no trouble, since we shall see that from 1710 to 1832 they always elected as their representatives the royal nominees.[7] That the bishops could be and were influenced by the prospect of translation to a more lucrative or a more dignified see was recognised by Paley.[8] And this stronger influence which the Crown possessed over the House of Lords was often very useful to the ministry. It was not difficult to make sure that a Bill,

[1] Here are three of them taken from Lloyd Sanders' memoir entitled "Patron and Place-hunter," p. 278:

Love thy country, wish it well
Not with too intense a care,
'Tis enough that when it fell
Thou its ruin did not share.

Void of strong desire or fear,
Life's wide ocean trust no more,
Strive thy little bark to steer
With the tide but near the shore.

Thus prepared, thy shortened sail
Shall whene'er the winds increase,
Seizing each propitious gale,
Waft thee to the Port of Peace.

[2] In 1733 Walpole induced the Crown to deprive of their offices peers who had protested against the exercise of royal influence upon the House of Lords, Turberville, House of Lords in the XVIIIth Century 206; he induced the King in the same year to dismiss Lords Chesterfield and Clinton for their opposition to his excise scheme, Hervey, Memoirs of the Reign of George II (ed. 1884) i 210.

[3] Below 62.

[4] "Between the time when it was debated whether the House of Lords should call for papers, and enter at all into the examination of the state of the South Sea Company, and the day fixed for taking the matter into consideration, many Lords were *closeted, schooled* and *tampered with* by the Ministers, some by the King, and more by the Queen," Hervey, op. cit. i 233.

[5] Above 47.

[6] Public Spirit of the Whigs, Works (ed. 1768) ii 156.

[7] Vol. xi 11.

[8] "If bishops from gratitude or expectation be more obsequious to the will of the crown, than those who possess great temporal inheritances, they are properly inserted into that part of the constitution from which much or frequent resistance to the measures of government is not expected," The Principles of Moral and Political Philosophy (2nd ed.) 484-485; in 1731 a motion for a bill to prevent the translation of bishops was lost in the Lords, Parlt. Hist. viii 857-858.

which could not be conveniently opposed in the House of Commons, should be rejected in the House of Lords. Walpole, for instance, generally left Bills to disable pensioners or office-holders from sitting in the House of Commons to be rejected by the House of Lords, since constituents might object if their member had voted against such a Bill.[1]

It will be obvious that all these means which the Whig party used to organize and perpetuate their rule, presupposed that the two Houses and the Crown had large and independent powers. No doubt the House of Commons, by reason both of its representative character and of its control over finance, was the predominant partner; but it was only a partner. Both the King and the House of Lords had both direct and indirect methods of controlling it; and, as I have already pointed out, this control assisted the establishment of Parliamentary government and its orderly development, because it eliminated those embittered controversies between the two Houses, and between the King and Parliament, which had been frequent since the Restoration.[2] Because the organization of the Whig party thus rested upon the possession by the Crown and by the House of Lords of independent powers, the Whigs may be said to be the creators of that mixed constitution, each part of which checked and balanced the other parts, which was the pride of eighteenth-century statesmen,[3] and won the admiration of many foreign publicists.[4] This was the greatest achievement of the Whig party during its half-century of power. It left deep marks upon our public law right down to 1832; it left even deeper marks upon the public law of the United States; and its indirect effects upon our public law are not wholly eliminated even at the present day.

The predominance of the Whig party during the reigns of George I and George II seemed to be unassailable. But it suffered from two weaknesses which eventually caused its downfall.[5]

In the first place, we have seen that it still depended quite as

[1] Coxe, Walpole i 322; Parlt. Hist. xii 1-7, 592-610; it was frequently alleged with some justice that the Septennial Act had helped ministers to corrupt Parliament, below 563; and also that the influence which ministers thus got over the House was destroying the balance of the constitution, see Parlt. Hist. xi 542; below 520; Pelham, on the other hand, maintained with more reason that the fact that placemen could have seats in the House preserved the balance of the constitution, because it obliged the Crown to appoint men of fortune and character who were interested in maintaining the authority of the House; whereas if the Crown appointed men of no fortune or character they would be more ready to help the Crown to overturn the liberties of the country, ibid 348; we shall see that the system of influence applied by ministers to Parliament was the most essential of the constitutional conventions of the eighteenth century, without which the constitution could not have been worked, below 630.

[2] Vol. vi 249.

[3] Below 714-716.

[4] Below 714.

[5] Below 87-90.

much on the King as upon the strength of the party in the two Houses of Parliament ; [1] and the King often needed very careful management. It is for this reason that the constitutional position, during the reigns of the first two Hanoverian Kings, presents a modern appearance which is fallacious. The modern system of party government seems to be in operation ; ministers seem to be governing through a cabinet which depends for its support on a majority of the House of Commons ; and Walpole seems to be in the position of a modern prime minister. But we have seen that party government in its modern sense did not exist ; [2] and we shall see that some of the most essential principles of cabinet government had not emerged.[3] The ministerial majority in both Houses was secured partly by the territorial influence of the Whig magnates, and partly by the influence of the King, who was in a position to exercise so real a power that even Walpole was in a very different position to that of a modern prime minister. His position in George II's reign has never been described so accurately as by Bagehot : [4]

> Sir Robert Walpole was the greatest master of Parliamentary tactics and political business in his generation ; he was a statesman of wise views and consummate dexterity ; but these intellectual gifts, even joined to immense parliamentary experience, were not alone sufficient to make him and to keep him Prime Minister of England. He also maintained, during two reigns, a complete system of court strategy. During the reign of George II he kept a *queen-watcher*. Lord Hervey, one of the cleverest men in England, the keenest observer, perhaps in England, was induced by very dexterous management, to remain at court during many years—to observe the queen, to hint to the queen, to remove wrong impressions from the queen, to report every incident to Sir Robert. The records of politics tell us few stranger tales than that it should have been necessary for the Sir Robert Peel of his age to have a subordinate as safe as Eldon, and as witty as Canning, for the sole purpose of managing a clever German woman, to whom the selection of Prime Minister was practically entrusted.

In fact, the King was still regarded as the chief magistrate. The government was his government in more than name ; and a "formed opposition" to the King was regarded as factious.[5] The position which the King thus occupied gave him great personal power, and enabled him to exercise great influence over both the Houses of Parliament.[6] So long as the King regarded the Whig party as the great barrier against a Stuart restoration

[1] Above 58. [2] Above 32-33.
[3] Below 636-641. [4] Literary Studies i 237-238.
[5] Namier, England in the Age of the American Revolution 55-59 ; both Hardwicke and Mansfield expressed their dislike of such an opposition ; Namier says, "as the actual person of the king still always stood in the very forefront of politics all 'formed opposition' was in some measure tainted with disloyalty" ; for the same idea in Anne's reign see Trevelyan, op. cit. iii 65.
[6] Namier, op. cit. 59-60 ; above 52 ; below 579-580, 617-618.

all was well. But the failure of the Jacobite rebellion in 1745, and the measures taken to reduce the Highlands to order,[1] finally removed the fear of such a restoration. We shall see that the removal of that fear had an effect upon George III and his advisers similar to the effect which the removal of the fear of the French had upon the Americans. In both cases it created the conditions needed to secure independence.[2]

In the second place, except for the purpose of opposing the Tories, the Whig party was not a united party. Waldegrave truly said [3] that "the Whigs may aptly be compared to an alliance of different clans, fighting in the same cause, professing the same principles, but influenced and guided by their respective chieftains." [4] These clans, without any sacrifice of principle, could make and unmake alliances, as seemed most profitable to them, since no question of principle was involved. "The issue between Newcastle and the King," says Mr. Turberville,[5] "is sometimes represented as one between the principle of party government and prerogative. But Newcastle did not represent the party system as we understand it to-day. Does he anywhere express regret at the defeat of a great principle of government? No, his lamentations are all personal—for himself, his relations, his friends, Pelhams and Cavendishes!" "Had Newcastle and his friends," says Horace Walpole, "been able to keep their places, I question whether we should ever have heard from them of arbitrary schemes." [6] We shall see that this weakness in the organization of the Whig party put a valuable weapon into the hands of a King who wished to assert his independence.[7]

I must now turn to the history of the manner in which the Whig party used its power during the reigns of the two first Hanoverian kings. That history falls into three periods: (1) from the accession of George I to the rise of Walpole to power; (2) Walpole's ministry; and (3) from the fall of Walpole to the death of George II.

(1) *From the accession of George I to the rise of Walpole to power.*

The events which ensured the peaceful accession of George I, at the moment when the position of his main supporters, the Whigs, seemed to be almost desperate, were fortunate both for England and the Whigs. And fortune continued to favour the

[1] Below 78-81. [2] Below 86-88. [3] Memoirs 20.

[4] The truth of his statement is illustrated by a debate in 1748 on the project of holding the assizes at Buckingham, in which Sir W. Stanhope savagely attacked Richard Grenville, who was defended by Pitt, Parlt. Hist. xiv 204, 210.

[5] The House of Lords in the XVIIIth Century 491; see Newcastle's letters to Hardwicke cited Namier, American Revolution 468, 471.

[6] Memoirs of George III iv 144; cp. Namier, American Revolution 217-219.

[7] Below 89.

Whigs. Three sets of circumstances helped them to consolidate their unexpected victory.

In the first place, the extraordinary incapacity of the advisers of the Pretender led to the futile outbreak of 1715, which was undertaken without any attempt at co-ordination in Ireland or England, and without the knowledge of the Pretender's two ablest advisers—Berwick and Bolingbroke.[1]

In the second place, the suppression of this rising clinched the argument of the Whigs that the Tories were little better than Jacobites in disguise, and enabled them to pass two measures, one of which gave great assistance to the executive, while the other directly helped the Whigs to consolidate their Parliamentary strength, and indirectly helped the peaceful progress of Parliamentary government. The first of these measures was the Riot Act,[2] which is still in force. It gave the government much needed powers of dealing with riots and rebellions; and it obviated the necessity of resorting to the strained construction put by the lawyers upon that clause of Edward III's statute of Treasons which made it treason to levy war against the king.[3] The second of these measures was the Septennial Act,[4] which remained in force till the Parliament Act, 1911.[5] It was contended by the opponents of the Act, then and later, that it was beyond the legal powers of a Parliament elected for three years, to prolong its existence to seven ;[6] and both the prevailing uncertainty as to the meaning and implications of the sovereignty of Parliament,[7] and ignorance of the legal results of the preceding legislation as to the duration of Parliament,[8] gave weight to a fallacious argument. It was also contended that the Act, by lengthening the duration of Parliament, would increase the control which the Crown was able to exercise upon it.[9] That was the undoubted result of the Act; and therefore, so long as the Crown was committed to the Whig party, it increased the strength of that party.[10] On the other hand, this effect of the Act had a good result, in

[1] Lecky, op. cit. i 266. [2] 1 George I St. 2 c. 5.

[3] Vol. viii 320, 328-329.

[4] 1 George I St. 2 c. 38; Turberville, House of Lords in the XVIIIth Century 163-166; Hallam, C. H. iii 235-238. [5] 1 and 2 George V c. 13.

[6] Parlt. Hist. vii 317, 328, 334, 339, 349; xiv 1055 (1751).

[7] Vol. vi 286-289, 298-299; cp. Holdsworth, Lessons from Our Legal History 127-130.

[8] Christian in his note to Bl. Comm. i 189 points out that the power of Parliament to pass the Act is a necessary consequence of the preceding legislation—"before the triennial Act 6 W. and M. the duration of Parliament was only limited by the pleasure or death of the King; and it can never be supposed that the next, or any succeeding Parliament, had not the power of repealing the triennial Act; and if that had been done, then, as before, they might have sat seventeen or seventy years. It is certainly true, that the simple repeal of a former statute would have extended their continuance much beyond what was done by the Septennial Act."

[9] Parlt. Hist. vii 304, 333, 342-343.

[10] Above 52; below 82, 87.

that it made for a better organization of party government, and so increased the efficiency of Parliament. The Act also increased the efficiency of Parliament as an organ of government because it made it more capable of pursuing a stable line of policy, by preventing those frequent and violent fluctuations of political opinion which had characterized the reign of Anne.[1] Moreover, it rendered less frequent those scenes of disorder which accompanied a general election.[2] These salutary constitutional results were the reason why an Act, passed to support a new dynasty against its enemies at home and abroad, was not modified for nearly two centuries.

In the third place, the chief danger of the new dynasty lay in the use which foreign enemies could make of Jacobite disaffection at home. But the position of affairs on the Continent went far to obviate this danger. France was impoverished, and Louis XIV was dying. His successor Louis XV was a minor; and the Regent favoured an alliance with England; for, in the event of the death of Louis XV, he wanted England's support for his claim to the throne. In 1717 a treaty was signed with France by which France guaranteed the Protestant Succession and expelled the Pretender.[3] Later there was some danger that Charles XII of Sweden, and the Tsar Peter the Great, supported by Spain, would combine to effect a Stuart Restoration; but the death of Charles XII prevented this project from maturing; and a storm destroyed a fleet which Spain had fitted out to attempt an invasion of Scotland in the cause of the Pretender.[4]

All these events helped the cause of the Whigs and the Protestant Succession. But, even with their help, the new dynasty was none too secure. The foreign sympathies, foreign favourites, and foreign manners of George I, and his ignorance of the English language and English customs, made him very unpopular.[5] The heated party politics of Anne's reign had left a legacy of bitterness. The Whigs were bent upon revenge. They refused to admit any Tories into the government; and they set up a committee of secrecy which presented a report in which all the misdeeds of the ministers during the last four years of Anne's reign were recapitulated.[6] The impeachments of Bolingbroke, Oxford, Ormond, and Strafford, for high treason, which were undertaken as the result of that report, were both unjustifiable and imprudent.[7] The effect of this policy of revenge was to

[1] Lord Carteret's speech, Parlt. Hist. vii 298-299; Coxe, Walpole i 422-423 reporting Walpole's speech on a motion in 1734 for the repeal of the Act.
[2] The Earl of Islay's speech, Parlt. Hist. vii 302.
[3] Lecky, op. cit. i 284-286, 308.
[4] Ibid 294-296, 301, 304.
[5] Ibid 262-263.
[6] Ibid 259-260.
[7] Ibid 259; Hallam, C.H. iii 233; Bolingbroke and Ormond, having fled the kingdom, were attainted by Act of Parliament, 1 George I St. 2 cc. 16 and 17.

drive Bolingbroke to take service with the Pretender, to convert many Tories who had supported the Protestant succession into Jacobites, and thus to make the party as a whole a Jacobite party.[1] Considering that the largest part of the nation sympathized with the Tories, this was a very dangerous policy. It bore its fruit in the rising of 1715, in sporadic disturbances at Oxford, London, and elsewhere,[2] and in the plot in which Atterbury, Bishop of Rochester, was concerned in 1722.

These dangers were increased by the growth of a split within the Whig party. The attempt of the King and his Hanoverian favourites to make the policy of England subservient to that of Hanover, the modification of the Act of Settlement which made it possible for the King to make frequent visits to Hanover,[3] and the feud between the King and the Prince of Wales, were its main causes.[4] "The King hated his son, and the Prince of Wales was bent on making a party of his own against his father. The foreigners hated the English ministers, and the ministers were stubbornly set against the demands of the foreigners. The Cabinet was divided by no serious dissent on principle or policy, but by the even more dangerous element of personal jealousy and dissatisfied ambition. All these conditions united to make schism inevitable."[5] Differences on foreign policy were the ostensible cause of the dismissal of Townshend, the resignation of Walpole, and the accession to power of Sunderland and Stanhope.

It was this ministry which attempted to pass the Peerage Bill of 1719, which would have had a disastrous effect, not only upon the relations of the two Houses of Parliament, but also upon the relations of Parliament and the Crown. The bill provided that the King could create a new peerage when an old peerage became extinct, but that, with the exception of members of the royal family, he could not create more than six new peerages. Twenty-five Scotch hereditary peers to be chosen by the Crown were to be substituted for the sixteen representative peers.[6] The bill was a move in the party game. The section of the Whig party which held office wished to secure itself in power. But some of the Whigs were in opposition, and the Prince of Wales was attached to the opposition. It was feared that the Prince of Wales, when he succeeded to the throne, might follow the precedent of 1712, when twelve Tory peers were created in order to secure the Treaty of Utrecht, and so, as Mr. Turberville has said, "obtain a controlling influence in what still remained

[1] Above 52. [2] Lecky, op. cit. i 261-262. [3] 1 George I St. 2 c. 51.
[4] Lecky, op. cit. i 367-369. [5] Morley, Walpole 49.
[6] Hallam, C.H. iii 238-240; Lecky, op. cit. i 230-232; Morley, Walpole 56-58; E.H.R. xxviii 243.

the dominant Chamber in the Legislature." [1] Walpole organized the opposition to the bill; [2] and, by one of the most powerful speeches which he ever made, induced the House of Commons to reject it. He said:

> Among the Romans, the wisest people upon earth, the Temple of Fame was placed behind the Temple of Virtue, to denote that there was no coming to the Temple of Fame but through that of Virtue. But if this Bill is passed into a law, one of the most powerful incentives to virtue would be taken away, since there would be no arriving at honour, but through the winding sheet of an old decrepit lord, or the grave of an extinct noble family.[3]

To pass that bill, therefore, "would be a discouragement to virtue and merit." [4] But his strongest and truest argument against it was that it would endanger the balance of the constitution, and thereby create a risk of "subverting the whole, by causing one of the three powers, which are now dependent on each other, to preponderate in the scale." "The Crown," he said, "is dependent on the Commons by the power of granting money; the Commons are dependent on the Crown by the power of dissolution; the Lords will now be made independent of both." [5] As Mr. Turberville truly says: [6]

> The bill brought with it a real danger that the English peerage might degenerate into a mere caste, growing more and more out of touch even with the squirearchy. A persistent state of animosity between the Houses might easily have resulted. Constant friction between a House of Lords, predominant in the Legislature, and a House of Commons, ambitious for its own aggrandisement, might have had most serious consequences for the community.

It was fortunate for the English constitution that the Whig schism had not then been healed, since, but for the fact that Walpole was in opposition, the bill would probably have been carried. We shall now see that the occurrence of that schism was equally fortunate for the Whig party.

In 1720, just before the bursting of the South Sea Bubble,[7] the Whig split came to an end, and Townshend and Walpole returned to the government, but in a subordinate capacity.[8] The bursting of the bubble made Walpole's fortune. He had always been an opponent of the South Sea scheme; he had only become a member of the government a few months before the crash came; and his financial reputation was already great.

[1] The House of Lords in the XVIIIth Century 169; apparently the ministers were also thinking of repealing the Septennial Act, as they thought that they might not be able to control a new Parliament, E.H.R. xxviii 255-256.
[2] Morley, Walpole 58-60.
[3] Parlt. Hist. vii 618-619.
[4] Ibid 621.
[5] Ibid.
[6] Op. cit. 185.
[7] For the South Sea Scheme see vol. viii 218-219; Lecky, op. cit. i 371-374.
[8] Ibid 370-371.

The Whigs appealed to him to save the state and their party. As Lecky has pointed out, it was fortunate for that party that the Whig schism had prevented all its members from sharing the responsibility for the disaster—" had it been otherwise, the whole party might have fallen beneath the outburst of popular indignation, and a party which was now purely Jacobite might have been summoned to the helm." [1] There is no doubt that the public confusion encouraged the Jacobite plot of 1722, for complicity in which Atterbury, the Bishop of Rochester, was banished.[2] In 1721 Walpole began his long ministry which secured the Protestant succession, consolidated the power of the Whigs, set Parliamentary government upon a firm footing, and went some way to laying the foundations of Cabinet government.

(2) *Walpole's Ministry.*

Walpole [3] was born in 1676. He was educated at Eton; and it was there that he began his rivalry with St. John which lasted throughout their lives. On the death of his father in 1700 he entered Parliament, and at once attached himself to the Whig party. He was Secretary at War in 1708, Treasurer of the Navy in 1709, and one of the managers of Sacheverell's impeachment in 1710. His defence of Godolphin's financial policy in the succeeding Parliament laid the foundation of his own financial reputation. In 1712 he was imprisoned and expelled from the House of Commons by the Tory majority on a charge of corruption. The fact was that, though personally he had taken no bribe, he had got an advantage for a friend out of a government contract. Such a transaction in those days left no stain on anyone's reputation; and Walpole was regarded as a martyr in the Whig cause.[4] In 1714, when George I came to the throne, he became Paymaster of the Forces, and, in 1715, First Lord of the Treasury and Chancellor of the Exchequer. He acted as chairman of the secret committee which investigated the misdeeds of the ministers who had made the Treaty of Utrecht, and presented the report of that committee to the House of Commons. On the dismissal of Townshend in 1717 he resigned—much against the wishes of the King who had, like every one else, a great admiration for his financial abilities. Walpole, he once said, could make gold from nothing. His conduct in opposition was often factious—he opposed the Mutiny Act, and the repeal

[1] Op. cit. i 374.

[2] " When the South Sea Bubble burst, the Speaker declared that if the Pretender had then appeared, he might have ridden to St. James's," Camb. Hist. of British Empire i 349, citing Charteris, Cumberland 8.

[3] Coxe's Life; Morley, Walpole; Lecky, op. cit. i 375-471.

[4] Trevelyan, op. cit. iii 199.

of the Schism Act. But, as we have seen, he did a great service to the constitution by his successful opposition to the Peerage Bill.[1] Both his opposition to the South Sea scheme, and his financial abilities, called him in 1721 to take the lead in the new government.

From that time his financial and Parliamentary abilities, and the confidence of the King, made him and the Whig party supreme. But it must always be remembered that the support of the Crown was then as necessary to a minister as the support of the House of Commons—in fact the support of the House of Commons was to a great extent dependent on the support of the Crown.[2] For a brief interval, on the accession of George II (1727), Walpole was out of office. But Sir Spencer Compton, the Speaker, whom George II proposed to make chief minister, was so obviously incompetent that Walpole returned to office in a few days ;[3] and, with the help of George's clever Queen Caroline, he remained in office till his fall in 1742.

Walpole was a practical man of business with a genius for finance. He was not a great orator ; but he was a very effective speaker, an experienced debater, and a great Parliamentary tactician. His abilities and address enabled him to win and to retain the confidence of two Kings and of the House of Commons. He was as much a realist in politics as Frederick the Great. His experiences both in office and in opposition had impressed upon him the insecurity of the tenure of the Hanoverian dynasty, and the imperative need of reconciling the nation to the new constitutional settlement. It is this conviction which is the keynote to his policy ; and it is his success in placing that dynasty and that settlement on a secure basis which is his greatest achievement.

To accomplish this result four things were necessary—(i) a sound financial policy ; (ii) a peace policy ; (iii) the avoidance of all measures which were likely to arouse those religious and political prejudices which, in Anne's reign, had produced disastrous results to the Whig party, and had endangered the Hanoverian succession ; and (iv) a disciplined majority in the House of Commons.

(i) It was the bursting of the South Sea Bubble which had called Walpole to power. His settlement of that question, and

[1] Above 66. [2] Above 60-61 ; below 637.

[3] "My mother," says Horace Walpole, "Sir Spencer's designation, and not its evaporation being known, could not make her way between the scornful backs and elbows of her late devotees, nor could approach nearer to the queen than the third or fourth row : but no sooner was she descried by her Majesty, than the queen cried aloud, *There I am sure I see a friend !* The torrent divided and shrunk to either side ; 'and as I came away,' said my mother, 'I might have walked over their heads if I had pleased,'" Lord Orford's Reminiscences 60.

his management of the finances went far to reconcile the Tory landowners to the new dynasty, and to retain the support of the mercantile classes. He conciliated the landowners by reducing the land tax and the interest on the national debt, and by taking measures for the reduction of the principal of that debt by providing a sinking fund for its repayment—though unfortunately he did not always apply this fund to its proper purpose. He conciliated the mercantile classes by an enlightened fiscal policy. "Trade," he said, "is the main riches of the nation and enhances the value of our land." [1] He promoted trade by his reforms in the customs revenue. In 1721 he abolished the export duties on 106 articles and the import duties on 38 articles; and he would have effected still greater improvements if the popular agitation against his excise scheme had not caused him to abandon it. It was a scheme, he said, which "can be hurtful to none but smugglers and unfair traders. I am certain that it will be of great benefit to the revenue, and will tend to make London a free port, and by consequence, the market of the world." [2] He freed the colonial trade from some of the restrictions which impeded its growth; [3] and refused to listen to propositions for taxing the colonies.[4] The results of this policy can best be judged from the following facts: "The abundance of money was so great that even the three-per-cents were in 1737 at a premium. The average price of land rose in a few years from 20 or 21 to 25, 26, or even 27 years' purchase. The tonnage of British shipping was augmented in the six years that preceded 1729 by no less than 238,000 tons," [5] and in 1739 the shipping of London was double that of Amsterdam.[6] The value of imports between 1708 and 1730 rose from £4,698,663 to £7,780,019, and of exports from £6,969,089 to £11,974,135.[7] Pitt's achievements would have been impossible without Walpole's work. "Johnson styled Pitt a meteor, Walpole, a fixed star, and after six generations Walpole seems the mountain mass, Pitt, the crag that crowns its summit. Pitt inspired the nation, but without Walpole the nation might well have been incapable of evoking or of answering his appeal." [8]

(ii) Walpole's financial programme demanded a peace policy; and a peace policy was also essential in order to ward off the danger of a Stuart restoration. By himself the Pretender could

[1] Cautions to those who are to chuse members to serve in Parliament (1714) 22, cited Camb. Col. Hist. i 348.
[2] Coxe, Walpole i, 399. [3] Ibid 326-327, 607.
[4] Ibid 753; Morley, Walpole, 168-169; for earlier propositions see Camb. Col. Hist. i 652.
[5] Lecky, op. cit. i 389.
[6] Anderson, Origins of Commerce iii 224, cited Camb. Col. Hist. i 524.
[7] Lecky, op. cit. i 389.
[8] W. F. Reddaway, Camb. Col. Hist. i 346.

do nothing; but he was a useful pawn in a European war, because a Jacobite rising supported by foreign arms could, if it did nothing else, prevent England from interfering on the Continent.[1] With infinite patience Walpole overcame the desire of George II to intervene in the wars of the Continent. "Madam," he said to the Queen in 1734, "there are fifty thousand men slain this year in Europe, and not one Englishman."[2] But some of the clauses of the Treaty of Utrecht had provided a standing cause of quarrel between the English and the Spanish merchants;[3] and, in 1739, the grievances of the English merchants, fanned by a powerful opposition and by dissension in the Cabinet, at length drove him against his better judgment into a war with Spain, for which it has long been generally recognized there were no sufficient grounds. Burke said:[4]

> Walpole was forced into the war in 1739 by the people, who were inflamed to this measure by the most leading politicians, by the first orators, and the greatest poets of the time. For that war Pope sung his dying notes. For that war Johnson in more energetic strains, employed the voice of his early genius. For that war Glover distinguished himself in the way in which his merit was the most natural and happy. The crowd readily followed the politicians in the cry for a war which threatened little bloodshed, and which promised victories that were attended with something more solid than glory. A war with Spain was a war of plunder.

The unsuccessful conduct of the war at length caused his fall in 1742. But the general European war, which followed the outbreak of war between England and Spain, abundantly justified Walpole's view that a war policy would probably mean a Jacobite rising; and his last speech in the House of Lords in 1744 was a remonstrance against neglecting the evidence that such a rising was imminent.[5] The rebellion of 1745 was a direct result of the English defeat at Fontenoy.[6] Victories such as were then won by the Pretender might well have proved fatal to the Hanoverian dynasty if they had been won twenty years earlier. The fact that in spite of these victories, England showed no disposition to support the Pretender, and the fact that the rebellion was easily crushed, are the best testimonies to the wisdom both of Walpole's peace policy and of his financial policy.

(iii) Walpole had never forgotten that outbreak of religious fanaticism occasioned by the impeachment of Sacheverell, which had driven the Whig party from power during the last four years of Anne's reign, and had imperilled the Hanoverian suc-

[1] Lecky, op. cit. ii 68-69.
[2] Cited, Morley, Walpole, 209-210.
[3] Above 46 n. 5.
[4] Letters on a Regicide Peace, Works (Bohn's ed.) v 192-193; cp. Camb. Col. Hist. i 341-344, 370, 560.
[5] Parlt. Hist. xiii 662-665.
[6] Lecky, op. cit. ii 28.

cession.[1] He was determined to give no opportunity for another such outbreak. And so, although the Occasional Conformity and the Schism Acts were repealed,[2] he refused to make any more concessions to the Protestant nonconformists, and inaugurated the policy of relieving office-holders from the consequences of non-compliance with the Test Act by annual Acts of indemnity —a course which continued to be pursued till the Test Act was repealed in 1828. That he was wise is shown by the clamour raised by the Act for the naturalization of the Jews in 1753[3]— a clamour which caused its repeal in 1754,[4] and by the Gordon riots which followed upon a small measure of relief given to the Roman Catholics.[5] At the same time he took positive measures to diminish the power of the church to stir up popular feeling against the government. The appointment of latitudinarian bishops and the suppression of Convocation had this result; and these measures were helped by the growth of religious scepticism, which was to some extent encouraged by this policy.[6]

Walpole's treatment of the religious question is the keynote of his policy on other matters. Just as he treated the religious question so he treated all other questions which seemed likely to rouse popular passions. Rather than arouse such passions he would abandon his best-considered schemes. His abandonment of his excise bill is the best illustration of this fact—he would not, he said, be the minister to enforce taxes at the expense of blood.[7] His neglect to take effective measures for the government of the Highlands, and his refusal of propositions to raise regiments from the Highland clans,[8] are due to the same cause.[9] It is for this reason that the period of his ministry is marked by no great legislative reforms. But if this policy had its bad side in its neglect of necessary reforms,[10] and in the

[1] Above 43-44; as late as 1753 Pelham, in the debate on the repeal of the Jews' Naturalization Act, cited the Sacheverell case to show that most fatal consequences followed from an injudicious treatment of religious questions—the fall of the government, and "a most infamous peace when our armies were approaching the very gates of Paris," Parlt. Hist. xv 142-143.

[2] 5 George I c. 4; some relief was given to Quakers in the matter of affirmations and proceedings for the recovery of tithes and church rates by 1 George I, St. 2 c. 6.

[3] 26 George II c. 26. [4] 27 George II c. 1. [5] Below 114.

[6] Lecky, op. cit. i 310-311, 362-363.

[7] Coxe, Walpole i 404; other illustrations are his conduct in regard to Wood's halfpence and the Porteous riots.

[8] Lecky, op. cit. i 386.

[9] Ibid 421-422; some attempts were made to secure the peace of the Highlands by 1 George I St. 2 c. 54, and 11 George I c. 26, but they were not effectual, as the rebellion of 1745 showed.

[10] Even his friend Lord Hervey thought that he unduly neglected necessary reforms—"he would never lend his assistance nor give the least encouragement to any emendation either of the law or the Church, though the expenses and hardships of the first, and the tyranny and injustice of the last in the ecclesiastical courts, were got to an excess wholly unjustifiable and almost insupportable," Memoirs of George II ii 66.

growth of a religious apathy which was detrimental to the nation, and rendered the church unable to guide the religious revival which is associated with the names of Wesley and Whitfield ;[1] it had its good side in the introduction of a new spirit of tolerance in politics and religion. In politics it mitigated the bitterness of party spirit, and put a stop to political persecution. "No government," he truly said, "ever punished so few libels, and no government ever had provocation to punish so many."[2] In religion it made for a growing feeling in favour of modifying the penal laws which pressed upon religious nonconformists.[3]

(iv) Walpole's sensitiveness to public opinion, and even to unrepresented public opinion, made him equally sensitive to the opinion of the House of Commons. He respected the House[4] and it trusted him. He knew that the House was the strongest of the three partners amongst which the power of the state was divided. But he also knew that if he wished to have a disciplined majority at his command, he must get and retain that majority by the only methods which were then possible—he was, as I have said, a realist in politics, and most of all a realist where the management of the House of Commons was concerned. Members of Parliament and those who elected them were venal. Boroughs were freely bought and sold.[5] If his majority was to be kept together he must employ all the resources of his supporters, and all the resources of the Crown. He used the Crown's patronage, and probably the secret service money, systematically ; and he secured the rejection either by the House of Commons or by the House of Lords of many pension bills, because they would have impeded the working of those means of influencing Parliament.[6] By thus organizing his party, he lowered the tone of public morals, helped to prevent the House of Commons from representing the real opinions of the nation, and "constructed a system under which a despotic sovereign or minister might make a Parliamentary majority one of the most

[1] Below 423.

[2] Cited Lecky, op. cit. i 399. Macaulay justly says, in his Essay on Walpole's Letters, that "Sir Robert Walpole was the minister who gave to our Government the character of lenity which it has since generally preserved. . . . With a clemency to which posterity has never done justice he suffered himself to be thwarted, vilified, and at length overthrown, by a party which included many men whose necks were in his power."

[3] Lecky, op. cit. i 363.

[4] In 1739 he said, "a seat in this House is equal to any dignity derived from posts or titles, and the approbation of this House is preferable to all that power that even Majesty itself can bestow: therefore when I speak here as a minister, I speak as possessing my powers from his Majesty, but as being answerable to this House for the exercise of those powers," Parlt. Hist. x 946.

[5] Above 57-58 ; below 576-577.

[6] Lecky, op. cit. ii 62 ; Turberville, The House of Lords in the XVIIIth Century 198-200.

subservient and efficient instruments for destroying the liberties of England." [1] We shall see that it was this system which enabled George III for a time to disturb the balance of power in the constitution, and to impede the natural evolution of Parliamentary government, by largely increasing the personal authority of the Crown.[2] But in Walpole's defence it can be said, and said with truth, that the maintenance of the Hanoverian succession depended upon securing for the Whig party a permanent majority in the House of Commons; and that to secure that majority it was necessary to organize that party by the only methods which were then possible. The only charge which can be validly made against him is, not that he used corrupt methods, but that he used them to the exclusion of all other methods. As with his avoidance of all measures, however wise, which seemed likely to excite opposition, so with his use of those methods of Parliamentary management, he pushed lines of policy which were reasonable to extreme limits, and so produced evils, some of which might have been avoided by a less extreme application of those lines of policy.

This defect in Walpole's policy is largely due to the personal qualities of the man. He was not without social gifts, and he had an affable, gay, and most equable temperament. Even his political enemies felt no personal enmity for him. But these good qualities had serious limitations. He cared little for literature; and his morals and his conversation were coarse. His favourite amusements resembled those of Addison's fox hunter—a fact which helped to reconcile the Tory squires to his government; and his famous congresses at Houghton were the scenes of such riot and disorder that they drove Townshend from his neighbouring house at Rainham during their continuance.[3] He had one fixed ideal—the maintenance of the Hanoverian dynasty with the help of the Whig party; but his practical businesslike mind,[4] and his acquaintance with the details of

[1] Lecky, op. cit. i 433. Morley, in his Life of Walpole 120-127, takes a more lenient view than Lecky of the extent to which Walpole corrupted Parliament; I think Mr. Turberville, English Men and Manners in the XVIIIth Century, comes to the substantially correct conclusion when he says at p. 222 that Walpole owed his predominance "partly to his manipulation of Parliament and the elections by an organized system of corruption, which he certainly did not originate and which continued unabated long after his day, but which he carried on with remarkable skill and equal success.

[2] Below 101. [3] See Coxe, Walpole chap. 64.

[4] Hervey, Memoirs of the Reign of George II i 25, said of him, "he was not one of those projecting systematical great geniuses who are always thinking in theory, and are above common practice. . . . He always applied himself to the present occurrence, studying and generally hitting upon the properest method to improve what was favourable, and the best expedient to extricate himself out of what was difficult;" Chesterfield, Letters no. 309, said, "the hurry and confusion of the Duke of Newcastle do not proceed from his business, but from his want of method in it. Sir Robert Walpole, who had ten times the business to do, was never seen in a hurry, because he always did it with method."

political life, led him to rely for the support of his policy upon the baser motives which animate mankind, and to doubt and even to mock at higher motives. He knew very well upon what his own power was founded—his industry and capacity for rule, the confidence of the King and Queen, and the support of the House of Commons. Confident of his own powers, believing, and on the whole rightly, that his policy was the best for England, he pursued his own course, and swept out of his way any person who showed any signs of opposition. It was this impatience of any opposition which ultimately caused his downfall. Because he was, as Hume neatly phrased it, "moderate in the exercise of power, not equitable in engrossing it" he gradually recruited the opposition with the ablest men of his own party. Carteret, Pulteney, Chesterfield, Townshend, were all driven out of the ministry, and the first three joined the Tory opposition.

Under the influence of Bolingbroke, and guided by Bolingbroke's friend Windham, the Tory party was shedding its Jacobitism. Bolingbroke had been allowed to return to the country, and his estates had been restored to him. But since his attainder was not reversed, he could not take his seat in the House of Lords; and Walpole was much too apprehensive of his eloquence and abilities even to give him the opportunity to attack him in Parliament.[1] Even with this handicap Bolingbroke did much to organize the opposition from his country house at Dawley. He now fully accepted the Hanoverian succession, and he atoned for the disaster which his rash leadership had brought upon the Tory party,[2] by the creation of a new Tory party, entirely loyal to the new dynasty, and yet retaining those more historic, more liberal, and more national ideas, which were being crushed by the narrow outlook, the materialism, and the strict party organization of the Whigs who supported Walpole. He maintained that, since all parties now accepted the reigning dynasty, the old party lines were obsolete, and were only maintained in the interests of a faction.[3] Destroy that faction, restore the proper balance of the constitution, and let all parties rally round a Patriot King, who would take his proper place as King of the whole nation, and use the services of all its ablest men.[4] It was a fine ideal; and to ridicule it by comparing George III with Bolingbroke's Patriot King is to misunderstand it, and, what is more important, to misunderstand the effects direct and indirect which it produced.

[1] It is said that Bolingbroke had paid his court so successfully to the duchess of Kendal, George I's mistress, that the King was about to recall him and dismiss Walpole—but this story is discredited, and probably rightly, by Coxe, op. cit. i 262-265; cp. Morley, Walpole 84.

[2] Above 54-55. [3] Lecky, op. cit. i 446.

[4] The Idea of a Patriot King (ed. 1752) 141-142, 146-147, 162-164.

In his endeavour to reconstruct the Tory party, Bolingbroke was helped first by the feuds in the royal family, and secondly by the members of the Whig party whom Walpole had driven into opposition. It was obviously impossible to maintain that the Tories who attached themselves to the Prince of Wales, or that the leading Whigs who had joined the opposition, were disloyal to the Hanoverian dynasty. Both the Tories and these leading Whigs were united in denouncing a government by faction ; and Pulteney and Bolingbroke combined to attack Walpole's system in *The Craftsman*. The ranks of the opposition were also recruited by a powerful phalanx of younger men led by Pitt—" the Boys," or " the Patriots," Walpole called them—who were revolted by Walpole's cynical disregard for all the higher moral principles, and were attracted by the ideal of good government without party which was preached by Bolingbroke.[1]

This heterogeneous opposition concentrated its attack on Walpole, and at length succeeded in compelling him to resign. Though his health was failing, he fought to the end with all his old spirit ; and to the end he was supported by the King,[2] who always had a genuine admiration for his courage and ability.[3] When, at the beginning of George II's reign, Walpole had promised to obtain an increase in the civil list, the King had said, " consider Sir Robert, what makes me easy in this matter will prove for your ease too ; it is for my life it is to be fixed, and it is for your life." [4] George II kept his word.[5] He parted from Walpole with the utmost reluctance and with genuine sorrow ; [6] and, on his retirement, he made him earl of Orford with a pension of £4,000 a year. Public opinion endorsed the King's view. " There were a few bonfires last night," wrote Horace Walpole, " but they are very unfashionable, for never was fallen minister so followed. " [7]

It has sometimes been said that Walpole ought to have resigned when he was defeated on his excise bill, and when he was driven to declare war on Spain. But these criticisms are based

[1] As to the influence of Bolingbroke on Pitt see Sichel, Bolingbroke and his Times, ii 380-382.

[2] Coxe, Walpole i 656.

[3] Hervey relates that when he gave the King an account of how Walpole met the attacks on his excise scheme in the House of Commons, the King " would often cry out, with colour flushing into his cheeks and tears sometimes in his eyes, and with a vehement oath, ' He is a brave fellow ; he has more spirit than any man I ever knew,' " Memoirs i 189.

[4] Ibid i 44.

[5] Chatham said of George II in 1770 that " he possessed justice, truth, and sincerity in an eminent degree," Parlt. Hist. xvi 849.

[6] " When he kissed the King's hand to take his first leave, the King fell on his neck, wept, and kissed him, and begged to see him frequently," Walpole's Letters (ed. Toynbee) i 171.

[7] Ibid.

on the fallacy that cabinet government, as we understand it, and the ethics of that government, were then in substance recognized. We shall see that this was not the case.[1] The system of cabinet government was beginning to be formed; but it was as yet rudimentary. Walpole owed his position quite as much to the King as to the House of Commons. There was a personal relation between Walpole and the King, which the modern system of cabinet government has largely eliminated. Walpole may well have thought that he was in honour bound not to desert the King; for he knew very well that he was better fitted than any of his opponents to conduct the King's government. So long as he had the support of the King; and so long as, with the help of that support, he could keep a majority in the House of Commons, there was nothing in the constitutional ethics of the day which made it necessary for him to resign. It was only when he had lost that majority that resignation became necessary; and then he did not hesitate.

After his resignation there was some talk of an impeachment or a bill of pains and penalties; but it is a testimony to the new spirit which Walpole had infused into party politics, that this talk came to nothing. The secret committee set up by the House of Commons produced no information of any importance, because the King refused to give any information as to the expenditure of his secret service money;[2] and the House was driven to pass an indemnity bill to encourage all who would give evidence relating to Walpole's conduct as a minister. That bill only passed the Commons by a narrow majority; and it was thrown out by the Lords.[3] The popular indignation against him subsided; down to the end of his life his counsel was sought by the leading Whig statesmen; and it was mainly due to his influence that the Pelhams succeeded to his position, and carried on the government for a few years on his system.[4] But that system had served its purpose. New times were at hand which demanded a modification not only in that system, but in that cautious policy of peace abroad and *laissez-faire* at home, which Walpole had pursued so long and so successfully. But, though new times demanded new policies, it was the work of Walpole in the constitutional, colonial, and economic spheres which enabled these new policies to be pursued. As Burke justly said:[5]

[1] Below 637-642.

[2] Calendar of Treasury Papers, 1742-1745 xxxix-xl; Scrope, the secretary to the Treasury, refused to give any information as to the expenditure of the secret service money, saying that, as he was over 80 years old, he cared not whether he spent his few remaining months or years in the Tower or outside it, E. Hughes, Studies in Administration and Finance 311.

[3] Coxe, Walpole i 713-715.

[4] Morley, Walpole 246-250; below 78.

[5] Appeal from the New to the Old Whigs, Works (Bohn's ed.) iii 51.

The profound repose, the equal liberty, the firm protection of just laws, during the long period of his power, were the principal causes of that prosperity which afterwards took such rapid strides towards perfection; and which furnished to this nation ability to acquire the military glory which it has since obtained, as well as to bear the burthens, the cause and consequence of that war-like reputation. . . . The prudence, steadiness, and vigilance of that man, joined to the greatest possible lenity in his character and his politics, preserved the crown to this royal family, and with it, their laws and liberties to this country.

In Burke's verdict our greatest historical novelist concurred.[1]

(3) *From the fall of Walpole to the death of George II.*

The heterogeneous elements which composed the opposition were united only by their hostility to Walpole. When he resigned it at once fell to pieces. The most discordant measures were advocated by its various sections;[2] public opinion outside Parliament was aroused; and claims were made that the electors, and even that the people as a whole, had the right to control their representatives, and to dictate the policy of the state.[3] But the excitement died down, and the ministry was reformed on a Whig basis. Its leaders were the Duke of Newcastle and his brother Henry Pelham, Lord Hardwicke, the Lord Chancellor, and Carteret.

The war with Spain had been merged in the European war of the Austrian succession. The large part which, under Carteret's influence,[4] England took in this war soon made Carteret very unpopular. In spite of his great abilities, to which those who then opposed him testified in later days,[5] his arrogance towards

[1] W. M. Thackeray says in his *Four Georges*, "But for Sir Robert Walpole we should have had the Pretender back again. But for his obstinate love of peace we should have had wars which the nation was not strong enough nor united enough to endure. . . . He gave Englishmen no conquests, but he gave them peace, ease, and freedom; the three per cents nearly at par; and wheat at five and six and twenty shillings the quarter."

[2] "Among those who thought themselves the most moderate, no two men agreed upon what was necessary. Some thinking that all security lay in a good place bill, about the degree and extent of which they likewise differed. Some in a pension bill, which others more justly thought would signify nothing. Some in a law for triennial parliaments, which all who did not delight in riot or in the prospect of corruption, thought both dangerous and dubious. Some for annual parliaments, which others thought too frequent. Some for justice on the minister. Others not for sanguinary views. . . . Some for making the army independent. Others for no regular troops at all," Fashion Detected 96, cited Coxe, Walpole 700-701.

[3] Ibid, cited Lecky, History of England i. 466-467.

[4] The best life of Carteret is that by Archibald Ballantyne; for a more impartial estimate see Lecky, op. cit. i 440-443.

[5] "Horace Walpole and Chesterfield, who disliked him, have both spoken of him as the ablest man of his time. . . . Chatham who was at one time his bitter opponent, has left on record his opinion that in the upper departments of government he had no equal," Lecky, op. cit. i 440-441; in fact, like Chatham, he saw that the real issue in foreign affairs was the issue between England and France, Basil Williams, Pitt i 99.

his colleagues, his contempt of all the arts of Parliamentary management, and his reliance solely on the King's favour, aroused an outcry against what appeared to be merely an Hanoverian war.[1] In 1744 he was compelled to resign, and, largely through Walpole's influence, the chief power fell to Henry Pelham and his brother the Duke of Newcastle. In the same year France declared war against England. The defeat of Fontenoy in the following year (1745) was followed by the Jacobite Rebellion of that year, which was not crushed till the victory of Culloden in the following year (1746). In spite of the capture of Cape Breton in 1747 and two naval victories, the war was conducted inefficiently and unsuccessfully. But the Pelhams were all powerful at home, and easily defeated the attempt of George II to replace them by the Earl of Bath and Carteret.[2] George II could only have supplanted his ministers by coalescing with the party of the Prince of Wales, and rather than do this he preferred to recall the Pelhams.[3] They made peace at Aix-la-Chapelle in 1748 on the basis of a mutual restoration of conquests.[4]

The Pelhams followed the policy of Walpole in its main lines. But in two respects they departed from his policy. In the first place, their period of office is marked by the enactment of several statutes which are more important than any of those enacted whilst Walpole held office. In the second place, the ministry ceased to be exclusively Whig.

(i) Of these statutes the most important are those dealing with the Highlands of Scotland, which were forced upon the government by the rebellion of 1745. These statutes fall under two main heads. First, the permanent measures, which completed the Act of Union by extirpating the feudal rule of the chiefs, and by extending to the Highlands the law and the machinery of justice which prevailed in other parts of Scotland; and, secondly, comparatively temporary measures designed to suppress disorder and disloyalty.

It is one of the most curious facts in the history of Great Britain that, in the Highlands of Scotland, there should have survived, right down to the middle of the eighteenth century, a semi-feudal, semi-tribal society, which could be said by a contemporary to be in the same moral condition as the Germans described by Tacitus.[5] Each highland clan was under the

[1] Basil Williams, Pitt i 99-100.

[2] Morley, Walpole 250-251; Lecky, op. cit. ii 34-35.

[3] Namier, American Revolution 59-60. As Namier has shown, the whole episode illustrates the fallaciously modern appearance which the constitutional phenomena of this period present, above 61.

[4] Lecky, op. cit. ii 37-39.

[5] Lord Kames, cited Lecky, op. cit. ii 259; on the whole subject see Lecky, op. cit. ii 255-274, 310-320. Dr. Johnson, in his Tour to the Hebrides, Works (ed. 1787) x 493, notes that in Ulva "is continued the payment of mercheta mulierum."

absolute control of its chief who combined the character of king, general, landlord, and judge.[1] Adam Smith [2] says :

> It is not thirty years ago, since Mr. Cameron of Lochiel, a gentleman of Lochaber in Scotland, without any legal warrant whatever, not being what was then called a lord of regality, nor even a tenant in chief, but a vassal of the duke of Argyle, and without being so much as a justice of peace, used, notwithstanding, to exercise the highest criminal jurisdiction over his own people. . . . That gentleman, whose rent never exceeded five hundred pounds a year, carried, in 1745, eight hundred of his own people into the rebellion with him.

The virtues and vices, the manners and customs, and the modes of life of the clansmen were those of a people who were little removed from savages. Hunting and the produce of their cattle, assisted by plunder and blackmail, were their main sources of livelihood. They had no industries, and their agriculture was rudimentary.[3] Their frequent feuds were conducted with atrocious cruelty.[4] But they were hospitable to persons whom they recognized as friends,[5] and they were absolutely loyal to their chiefs even when those chiefs were absent or exiled.[6] The chiefs could at the shortest notice raise an army to settle their controversies with rival chiefs, or to prosecute their hereditary feuds.[7] Naturally they were used to fight for the various religious and political causes which divided the state in the sixteenth and seventeenth centuries. After the Revolution it soon became clear that they could be used with effect by the Jacobite faction.

The Act of Union had had little direct effect upon the Highlands, since it had preserved the hereditary jurisdiction of the chiefs ; and the same cause had prevented Acts of George I's reign which provided for the disarming of the clansmen [8] and

[1] Lecky, op. cit. ii 256. " The laird has all those in his power that live upon his farms. Kings can, for the most part, only exalt or degrade. The laird at pleasure can feed or starve, can give bread or withhold it. This inherent power was yet strengthened by the kindness of consanguinity and the reverence of patriarchal authority. . . . And to these principles . . . was added for many ages an exclusive right of legal jurisdiction. This multifarious and extensive obligation operated with force scarcely credible. Every duty, moral or political, was absorbed in affection and adherence to the chief. Not many years have passed since the clans knew no law but the laird's will. He told them to whom they should be friends or enemies, what king they should obey, and what religion they should profess," Johnson, Tour to the Hebrides, Works (ed. 1787) x 420.

[2] Wealth of Nations (Cannan's ed.) i 385-386.

[3] Lecky, op. cit. ii 259-263. [4] Ibid 257-258. [5] Ibid 269.

[6] " For many years after the estates of Lord Seaforth had been forfeited for his participation in the rebellion of 1715, his rents were regularly collected by his tenants and transmitted to the Continent to their exiled lord," ibid 266-267.

[7] Dr. Johnson tells us, op. cit. 369, of a feud in the last years of William III's reign between Mackintosh and Macdonald of Keppoch.

[8] 1 George I St. 2 c. 54 § 1 ; 11 George I c. 26 ; the latter Act was only to last for seven years, so that it had expired before 1745 ; Dr. Johnson says, op. cit. 426, that the effect of these statutes was inconsiderable—which, considering the position of the chiefs, was only to be expected.

setting up of schools,[1] and the new roads built by General Wade after 1726,[2] from producing much effect. After 1745 Lord Hardwicke determined to strike at the root of the evil. In spite of the doubts and difficulties suggested by the Scottish judges,[3] he drafted and carried through Parliament the Acts of 1747. Those Acts vested the jurisdictions of the chiefs and of hereditary sheriffs in the King's courts, provided compensation to the former owners of these jurisdictions, instituted circuit courts for the whole of Scotland,[4] abolished the tenure of ward-holding together with its incidents, and converted this tenure, if a tenure in chief, into tenure by blanch holding, and, if a mesne tenure, into tenure by feu holding.[5] The only private jurisdictions which were allowed to survive were petty baronial jurisdictions in civil and criminal cases, jurisdictions over fairs and markets, and jurisdictions over colliers and salters in coal mines and salt works. In none of these cases was this jurisdiction to extend to any case which involved the loss of life or limb.[6] This legislation rendered effectual the Act of 1746 for the disarming of the Highlands;[7] and both it and another Act of the same year provided in three other ways for preventing the Highlands from again becoming centres of disaffection to the government. In the first place, since the episcopal clergy, who had got their orders from non-juring or Jacobite bishops, had helped to stir up rebellion, it was enacted that no clergyman should officiate unless he had letters of orders from a bishop of England or Ireland, unless these orders were registered, unless he took the prescribed oath, and unless he prayed by name for the King.[8] In the second place, private schools were required to be registered,

[1] 1 George I St. 2 c. 54 § 16; good work in this direction was done by the Scottish Society for the Propagation of Christian Knowledge, especially after 1745, Lecky, op. cit. ii 310.

[2] Ibid 311.

[3] They doubted whether such legislation was consistent with the Act of Union which secured these jurisdictions as rights of property, and found it impossible to give any information as to these jurisdictions, P. C. Yorke, Life of Hardwicke i 592; Lord Hardwicke pointed out that the jurisdictions were only reserved in the same way as they were then enjoyed by the law of Scotland, and that that meant that they were formerly subject to the Parliament of Scotland, and now to the Parliament of Great Britain, ibid 593.

[4] 20 George II c. 43.

[5] 20 George II c. 50; in effect it did for Scotland what the statute of Tenures of 1660 had done for England.

[6] 20 George II c. 43 §§ 17, 20-24; a 40/- limit was fixed for the civil jurisdiction, perhaps in imitation of the English rule for the jurisdiction of the English county courts, fixed by the statute of Gloucester, vol. i 72.

[7] 19 George II c. 39; 21 George II c. 34.

[8] 19 George II c. 38; 21 George II c. 34 § 13. "As the Scotch bishops were, without exception, non-jurors their letters of orders were insufficient, and as it was impossible for orders to be repeated, the effect of this law was to unfrock all the existing episcopal clergymen in Scotland, except the few who had been ordained out of the country," Lecky, op. cit. ii 314-315.

and both the teachers in them and private chaplains must take the oath of allegiance.[1] In the third place, except for soldiers in the regular army, the use of the Highland dress was forbidden.[2]

This legislation was entirely successful. When Dr. Johnson visited the Highlands in 1773 he found only faint survivals of the old order. The clans had been broken up, and the chiefs had become landlords. New methods of cultivation had been introduced on the forfeited estates and elsewhere. The change caused much hardship in individual cases. There was a raising of rents and ejectment of old tenants who were forced in many cases to emigrate.[3] But the new tenant, "taking the land at its full price treats with the laird upon equal terms, and considers him not as a chief, but as a trafficker in land. Thus the estate perhaps is improved, but the clan is broken."[4] But though much individual hardship was caused, the change was undoubtedly beneficial.

> Their chiefs being now deprived of their jurisdiction, have already lost much of their influence; and as they gradually degenerate from patriarchal rulers to rapacious landlords, they will divest themselves of the little that remains. That dignity which they derived from an opinion of their military importance, the law, which disarmed them, has abated. An old gentleman, delighting himself with the recollection of better days, related that forty years ago, a chieftain walked out attended by ten or twelve followers, with their arms rattling. That animating rattle has now ceased. The chief has lost his formidable retinue; and the Highlander walks his heath unarmed and defenceless, with the peaceable submission of a French peasant or English cottager.[5] . . . The roads are secure in those places through which, forty years ago, no traveller could pass without a convoy. All trials of right by the sword are forgotten, and the mean are in as little danger from the powerful as in other places.[6]

Though the old Highland polity thus disappeared, though the whole of Great Britain was made a really united kingdom, it has left its influence on Scottish life. "The clan legends, and a very idealized conception of clan virtues, survived the destruction of feudal power; and the pathos and fire of the Jacobite ballads were felt by multitudes long after the star of the Stuarts had sunk for ever at Culloden. Traditions and sentiments that were once the badges of a party became at last the romance of a nation; and a great writer arose who clothed them with the hues of a transcendent genius, and made them the eternal heritage of his country and of the world."[7]

Of the other enactments of this period the following are the

[1] 19 George II c. 38 §§ 21, 23; 21 George II c. 34 §§ 11, 12.
[2] 19 George II c. 39 § 17; 20 George II c. 51 § 1; 21 George II c. 34 §§ 7-10.
[3] Lecky, op. cit. ii 315-317.
[4] Johnson, Tour to the Hebrides, Works (ed. 1787) x 432.
[5] Ibid 425-426. [6] Ibid 431. [7] Lecky, op. cit. ii 344.

most important: Lord Hardwicke's Marriage Act which put an end to the scandal of Fleet marriages;[1] the Act for the reform of the calendar;[2] an Act regulating the sale of spirits[3] which replaced earlier and less effective Acts[4] passed to check the growing habit of drunkenness; and an Act permitting the naturalization of the Jews,[5] which popular clamour compelled the ministry to repeal in the following year.[6]

(ii) The ministry ceased to be exclusively Whig. In 1744 it was reconstructed on a broader basis, and Hardwicke could say to the King that "if Your Majesty looks round the House of Commons, you will find no man of business, or even of weight, left, capable of heading or conducting an opposition."[7] In 1746 the King was at last persuaded to give Pitt office;[8] in 1751 Carteret became President of the Council[9]—a position which he occupied till his death in 1763; and the death of the Prince of Wales in the same year got rid of the last of the centres of opposition. This broadening of the basis of the ministry was the first breach in the power of the Whig oligarchy. It was the first symptom of a decline in its power, which, in a few years, was to result in its defeat by the joint efforts of Pitt and George III.

The absence of any real opposition during the Pelham administration was not an unmixed blessing. It is largely due to this fact that the period is characterized by a lack of public spirit, by too great a concentration on commerce and material gain, by the growth of corruption, and by an indifference to religion, which was castigated in Browne's once famous *Estimate of the Manners and Principles of the Times.*[10] Browne was too pessimistic. His book was published in 1757-1758; and within a few months it became clear that a nation which could be roused, as England was roused, by the shock of defeat and by Pitt's

[1] 26 George II c. 33; Parlt. Hist. xv 1-86; Lecky, op. cit. ii 115-120; P. C Yorke, Life of Hardwicke, ii 58-76; Coxe, Pelham, ii 263-270; vol. xi 609-610.

[2] 24 George II c. 23, amended 25 George II c. 30.

[3] 24 George II c. 40; Lecky, op. cit. ii 101-105; Coxe, Pelham ii 181-182; below 183-188.

[4] 9 George II c. 23; 16 George II c. 8.

[5] 26 George II c. 26; Coxe, Pelham ii 245-253, 290-298.

[6] 27 George II c. 1; popular superstition was as opposed to the Jews Act as to the Act for the reform of the calendar; in 1753 Robert Nugent said that he was thought to be the author of a bill for naturalizing the Jews, "on the hearing of which an old woman made this judicious remark, 'Ay, it would be no wonder should he be for naturalizing the devil, for he was one of those that banished Old Christmas,'" Parlt. Hist. xv 136.

[7] Coxe, Pelham i 202; Basil Williams, Pitt i 127-129.

[8] Lecky, op. cit. ii 395-398.

[9] Ballantyne, Life of Carteret 329.

[10] For this book see Lecky, op. cit. ii 89-91; Macaulay said of it, in his Essay on William Pitt Earl of Chatham, that "the author fully convinced his readers that they were a race of cowards and scoundrels; that nothing could save them; that they were on the point of being enslaved by their enemies, and that they richly deserved their fate"; the author was a clergyman of ability who ultimately committed suicide.

oratory and statesmanship, had elements of soundness which Browne had overlooked.

The peace of Aix-la-Chapelle was only a truce imposed on the warring nations by their exhaustion—"a mere end of war because your powder is run out."[1] It did nothing to settle the American differences with Spain which had caused the outbreak of war in 1739,[2] and it did nothing to settle the differences between England and France in America and the East. The Treaty of Utrecht had left these differences unsettled,[3] and they had ever since been growing more acute. In fact, both in America and in India the position of the English and French settlements made war inevitable. In America the boundaries of the French and English possessions were ill defined; and the French were determined to connect their Canadian possessions with Louisiana, and thus to confine the English settlements between the Alleghanies and the sea. They had defeated a body of colonial troops under Washington in 1754, and in 1755 Braddock's expedition against fort Duquesne was routed.[4] In India Dulpleix aimed at making France the dominant power; but his aim was foiled by the victories of Clive and Lawrence in 1752 and 1753—victories won while England and France were still nominally at peace.[5] And yet the war which broke out in 1755[6] found the ministry both incapable and unprepared.

Pelham had died in 1754, and had left his brother the Duke of Newcastle the nominal head of the ministry. He was an adept in the art of "managing" Parliament, and, by his management, and by his intrigues to preserve power for himself and his party, he lowered the already low tone of political morals. He was not himself corrupt. In fact his efforts to keep himself and his party in power very considerably diminished his fortune. He was industrious, and worked hard to serve his country and his party. No doubt the advice of his life-long friend Hardwicke, whom he had brought into office, helped him to avoid some of the mistakes which his ignorance, dilatoriness, and the perplexity of his mind, rendered inevitable. But his hurried confused talk, his irritability, and his other personal peculiarities,[7] which were naturally emphasized by his contemporaries at the expense of his better qualities,[8] make him a wholly comic yet

[1] Carlyle, Frederick the Great vi 158. [2] Above 70.
[3] Above 46. [4] Lecky, op. cit. ii 351-355. [5] Ibid 366-367.
[6] There was in effect a state of war in 1755, though France did not actually declare war till 1756.
[7] Perhaps one of the best of the many *mots* was that of Lord Wilmington who said that he always appeared to have lost half an hour in the morning, and to be running after it all the rest of the day.
[8] For these qualities, and for a perhaps too favourable estimate of his character and abilities see P. C. Yorke, Hardwicke i 286-288; but Chesterfield said that "public opinion put him below his level," cited Namier, American Revolution 76.

half-pathetic figure, and a glaring instance, as Lecky has rightly said,[1] "of the manner in which, under the old system, great possessions and family or parliamentary influence could place and maintain an incapable man in the first position in the State."

A confused period in English domestic politics followed, and, consequently, a period of disgraceful mismanagement in foreign affairs. On the rumour of a French invasion in 1756 Hessian and Hanoverian troops were hastily brought over to defend the country. Minorca fell, and public opinion was so much aroused against Byng for failing to relieve it, that he was executed. In fact the failure of the government had aroused the feelings of the nation to an even greater degree than they had been aroused at the time of Walpole's fall;[2] and the nation had made up its mind that the only man who could save it was William Pitt. But his rise to power was difficult, partly because he was disliked by the King mainly on account of his attacks upon Carteret's Hanoverian policy, and partly because he was outside the Pelham connection. He came into power in 1756; and at once began vigorous preparations for war by land and sea—raising new regiments including two from the Highlands, reforming the militia,[3] increasing the navy, and preparing an attack on Louisberg. But the opposition of the Pelham interest was, as Horace Walpole foresaw,[4] fatal to his first ministry, and he was dismissed in April 1757. The resulting confusion was so great, and public opinion was expressed so strongly in his favour, that at length in June 1757, largely through the instrumentality of Hardwicke and with the assistance of Mansfield,[5] the famous coalition ministry of Pitt and Newcastle was formed. Pitt condescended to borrow the majority of the Duke of Newcastle to carry on the war and the government.[6]

The national instinct which indorsed Pitt's claim that he alone could save the nation, and forced him on the King, was absolutely correct. The nation could appreciate the qualities of a poor man whose sense of personal honour was so high that he refused to touch what were then regarded as the legitimate

[1] History of England ii 345. [2] Above 75.

[3] 30 George II c. 25. Pitt had introduced a militia bill in 1756 which was lost in the Lords, owing mainly to the criticisms of Lord Hardwicke, Parlt. Hist. xv 724-739; these objections were met in this Act passed in the following year; below 378.

[4] Letters (ed. Toynbee) iv 12—he said that his only chance was an alliance with Newcastle.

[5] Vol. xii 247-248, 473.

[6] For the composition of the ministry see Basil Williams, Pitt i 324-325; as Professor Williams says, "it was a ministry, unlike Pitt's first ministry, formed on the broadest basis and therefore more in conformity with his considered theory of administration."

perquisites of the office of paymaster of the forces; and enough of the amazing eloquence of his speeches, of their lofty idealism, and of their clearness of insight, had penetrated outside the walls of the House of Commons, to prove to the nation that he was a statesman of a stamp very different from that of any of his contemporaries. As Carlyle has said,[1] he "shines like a gleam of sharp steel in the murk of contemptibilities." He was perhaps at once the finest orator and debater, the ablest foreign statesman, and the ablest war minister,[2] that England has ever had. The character of his oratory was so striking that, in spite of the absence of Parliamentary reporting, more specimens of striking passages from his speeches have survived than from the speeches of any of his contemporaries. And it was set off by his personal gifts—"a singularly graceful and imposing form, a voice of wonderful compass and melody, which he modulated with consummate skill; an eye of such piercing brightness and such commanding power that it gave an air of inspiration to his speaking, and added a peculiar terror to his invective."[3] He absolutely dominated the House of Commons. His genius as a statesman and a war minister is shown by his intuitive insight into the heart of a political situation, by his ability to devise immediately the right measures to deal with the situation, and by his capacity both to choose the right man to execute those measures and to inspire those men, and indeed the whole nation, with some of his own confidence and enthusiasm. No doubt he had the defects of his qualities. His manners were theatrical, his temper was arrogant, and, though profoundly deferential to royalty, he resented the slightest opposition to his wishes. He never forgot, and he never let his colleagues forget, that he owed his position, not to the Parliamentary influence of a party, but to the support of the people; and there is no doubt that his career testifies to that influence of popular feeling which, all through the eighteenth century, made its influence felt at national crises,[4] in spite of the unrepresentative character of the unreformed House of Commons. But these defects in his character were but spots on the sun, and at this period were a help rather than a hindrance to his statesmanship. It was not till the next reign, when he had gone into opposition, when his health was failing, and when political conditions had been entirely altered

[1] Frederick the Great vii 140.

[2] "The ability to grasp, and hold unswervingly, the broad principles of strategy is so rare that its possession by Pitt in itself entitles him to the reputation of being a superlatively great war-minister. He realized that the theatre of the struggle was the whole world and had imagination enough to envisage it all as a single thing," Turberville, English Men and Manners in the XVIIIth Century 254.

[3] Lecky, op. cit. ii 383.

[4] Above 84; below 110; cp. Lecky, op. cit. ii 443.

by George III's settled policy to "be a King," that these defects produced disastrous results.[1]

The league of continental powers against Frederick the Great, and the seven years' war which ensued, showed Pitt how best he could realize his aim. That aim was to settle the questions which the Treaty of Utrecht had left unsettled,[2] by so thoroughly defeating France that henceforth England would be supreme both in America and the East. This aim, he saw, could be realized if Frederick was supported—in this way America could be won in Germany.

> To this course Pitt stands henceforth, heedless of the gazetteer cackle, "Hah! our Pitt too becomes German after all his talking"—like a seventy-four under full sail, with sea wind and pilot all of one mind, and only certain water fowl objecting. And is King of England for the next four years . . . his hand felt shortly at the ends of the earth.[3]

Frederick was saved, the French navy was driven from the sea, America was won, the French were expelled from India, the foundations of our Indian empire were laid, and large acquisitions were made in the West Indies. But in the full tide of these successes George II died—happy in the moment of his death;[4] and, for the last time in English history, the accession of a new King created an immediate change in the domestic and foreign policy of the state, and caused important developments in its public law.

The period which begins with the accession of George III in 1760 and ends with the defeat of the Fox-North coalition in 1783, and the rise of the younger Pitt to power, is a very distinct and important period in English political and constitutional history.

The final defeat of the Stuarts in 1745-1746 had very important effects (i) upon the foreign, and (ii) upon the domestic policy of the state. (i) The fact that the Pretender might

[1] "It was his intractable, incalculable nature, his genius tinged with madness, which, at least as much as the immature, unbalanced, passionate obstinacy of George III, produced the chaos of the first ten years of the new reign, and during the next fatal ten years placed the government in incompetent hands," Namier, American Revolution 181.

[2] Above 46.

[3] Carlyle, Frederick the Great vii 201-202; Feb. 2, 1759, Chesterfield wrote to his son, "there never was so quiet, or so silent a session of Parliament as the present: Mr. Pitt declares only what he would have them do, and they do it *nemine contradicente*, Mr. Viner only excepted," cited Parlt. Hist. xv 938 n.; for the respect with which he was treated after his fall, and the fear he inspired abroad, see Walpole's Letters (ed. Toynbee) vii 6, 29.

[4] "What an enviable death! In the greatest period of the glory of this country, and of his reign, and seventy-seven, growing blind and deaf, to die without a pang, before any reverse of fortune, or any distasted peace," Horace Walpole, Letters (ed. Toynbee) iv 446.

become formidable through the support of some European power had involved England very deeply in continental politics. When this danger was removed, England was more free to concentrate her attention upon her overseas possessions. For this reason Pitt was able, while supporting Frederick in order to distract France in Europe, to concentrate his main efforts upon winning for England the dominant position in America and India.[1] (ii) Now that the Jacobite menace was over, it was impossible to contend that all Tories were Jacobites. It was impossible to deny Bolingbroke's thesis that they were as loyal as the Whigs.[2] Hence there ceases to be any real division between the Whig and Tory parties. We have seen that this fact was recognized in the later years of George II's reign by the formation of broad-bottomed ministries.[3] In fact, during Pitt's ministry, there was no opposition. Pitt himself was opposed to the perpetuation of party differences. He had gained power, in spite of the Whigs and in spite of the King, by an insistent national demand;[4] and he wished to see a powerful ministry of all parties who would carry on the government for the good of the nation as a whole.

But it is obvious that this weakening of party ties was bound to affect the position of the King. We have seen that, even before 1745, the King could only be kept true to the Whig connection by careful management;[5] and that his conviction that he must depend on the Whig party prevented him from using to the full the advantages which his position as King gave him both in theory and in fact.[6] After 1745, when the Whig monopoly of power was weakening, this management was still more difficult. The King had begun to employ ministers who were not Whigs, and he had begun to perceive that, beyond the Whig party, there was the nation, whose prejudices he might use to get his own way. When Pitt told George II that the House of Commons wished that Byng should be pardoned, the King replied, "Sir, *you* have taught me to look for the sense of my subjects in another place than in the House of Commons."[7] Horace Walpole never

[1] "Not until France had sacrificed the Pretender at Aix-la-Chapelle (1748) could the Government afford to despise the Stuarts, or Pitt approach his task freed from the burden which had always crippled Walpole. For a full generation after Utrecht the Stuarts had forced posterity to trace the history of the British Empire rather in the rivalries and intrigues of Europe than across the seas," Camb. Col. Hist. i 349-350.

[2] Above 74.

[3] Above 82; Basil Williams, Pitt i 127-128; Namier, England in the Age of the American Revolution 225.

[4] When Pitt resigned in 1761 he said in his farewell speech to the Cabinet, "without having ever asked any one single employment in my life, I was called by my sovereign and by the voice of the people to assist the state when others had abdicated the service of it," Basil Williams, Pitt ii 112.

[5] Above 61. [6] Above 61-62. [7] Basil Williams, Pitt i 309.

spoke more truly or more prophetically than when he said in 1754,[1] "I am sensible that prerogative and power have been exceedingly fortified of late within the circle of the palace; and though fluctuating ministers by turns exercise the deposit, yet there it is; and whenever a prince of design and spirit shall sit in the royal chair, he will find a bank, a hoard of power, which he may play off most fatally against this constitution."

Such a prince was found in George III. He had been educated by his mother,[2] and by Bute. Bute was "a pompous pedantic Scotchman," with "a good person, fine legs, and a theatrical air of the greatest importance," but without any experience in public affairs, of whom Frederick Prince of Wales said that "he would make an excellent ambassador in a court where there was no business."[3] George III's mother and Bute had impressed on him the lesson that he must free himself from the domination of the Whig clans,[4] and held up for his imitation Bolingbroke's ideal of a "Patriot King," who would abolish party, dismiss corrupt ministers, and give peace and prosperity to the nation. He had learned from Blackstone how great the legal powers of the King were.[5] But, since his teachers were not men of affairs, he had not learned anything about those practical limitations upon the exercise of his powers which made it necessary, not only to manage Parliament, but also to gain the approbation of the nation.[6] Inexperienced youth delights in theories, and especially in theories which tend to magnify its importance. George III found no difficulty in assimilating such lessons as these. He determined to be no mere Elector of Hanover, but an English King. Unlike his two predecessors he determined to put England first and Hanover second. His announcement of his determination in a sentence in his first

[1] Memoirs of the Last Ten Years of George II i 326-327.

[2] Waldegrave, Memoirs 10, says that in his earlier years "the mother and the nursery always prevailed."

[3] Ibid 38.

[4] See Namier, American Revolution 67-68; the lesson was reinforced by the Earl of Bath through his agent Douglas, ibid 72-73.

[5] "Lord Shelburne had been the making of Blackstone. The Lord had been in personal favour with George III. He introduced the Lecturer, and made the Monarch sit to be lectured: so he himself told me," Bentham, Hist. Preface to the Fragment on Government, Works i 249; it is true that George III read Blackstone's Commentaries, but it is not true that Blackstone lectured to him, vol. xii 706.

[6] It is no doubt true, as Namier says, American Revolution 4, that George III "never left the safe ground of Parliamentary government," and merely acted like his nobles and gentry, in the measures which he took to manage Parliament; his great fault was that he made his desire "to be a King" an end in itself, and that he used his influence over Parliament for this object alone, thus antagonizing both Parliament and public opinion, and creating what the older statesmen had reprobated (above 33), a formed opposition to the Crown; George II never antagonized Parliament and public opinion by thus disregarding the practical limitations on his powers, so that no such "formed opposition" arose in his day.

speech to Parliament, which he added with his own hand,[1] was sufficient to give him the support of the whole of the Tory party. They welcomed a King who had determined not only to put first the interests of the United Kingdom, but also to be the King of the whole nation.

It was partly due to the skilful way in which George III used his position as King, and partly to the skilful way in which he used the jealousies existing between the different sections of the Whig party, and the shifting groups of which the House of Commons was composed,[2] that he was able to overthrow the Whig oligarchy.[3] He had learned from the Whigs and he imitated some of their methods. From this point of view, Horace Walpole was not far wrong when he said of Burke's pamphlet on "The Present Discontents," that "it was far from probing to the bottom of the sore." "The canker had begun in the administration of the Pelhams and Lord Hardwicke, who, at the head of a proud aristocracy of Whig Lords, had thought of nothing but establishing their own power; and who, as it suited their occasional purposes, now depressed and insulted the Crown and Royal Family, and now raised the prerogative."[4] As the Whig factions had treated the King, so the King now treated the Whig factions; and, as Horace Walpole rightly said, they deserved that treatment.[5] His withdrawal of the royal patronage deprived them at a blow of half their influence in both Houses. His condemnation of party, as party was then understood, aroused the sympathy of a nation which had been taught by Pitt's oratory, and by the success of his ministry, to take a justly low view of the rivalries of the Whig clans. In their condemnation of the party system as thus employed George III and Pitt saw eye to eye.[6] But they aimed at very different objects. Pitt's object was to secure the great position which he had won for his country by entrusting its government to the most able, loyal, and honest men that he could find. George III's object was to secure the independence of the Crown.

[1] "Born and educated in this country, I glory in the name of Briton; and the peculiar happiness of my life will ever consist in promoting the welfare of a people, whose loyalty and warm affection to me, I consider as the greatest and most permanent security of my throne," Parlt. Hist. xv 982.

[2] Namier, American Revolution 237, says, "the picture is one of many small, loosely knitted, shifting groups of which hardly any is of a uniform character, but most show some predominant characteristic, and can be described accordingly as bearing an oligarchic, territorial, professional, political, or a family character."

[3] See Winstanley, George III and his First Cabinet, E.H.R. xvii 678; I think that Walpole, Memoirs of George III iv 124, is right when he says that the original design of George III was rather to humble the aristocracy than to invade liberty.

[4] Memoirs of the Reign of George III iv. 136; Hardwicke almost admitted the truth of this charge, P. C. Yorke, Hardwicke, iii 361.

[5] Letters (ed. Toynbee) v 273.

[6] Basil Williams, Pitt ii 61, 205-206, 209.

To secure this object Pitt's powerful ministry must be broken up; Pitt must be got rid of; and peace must be made with France. The King was helped to accomplish these objects by the jealousy felt by the Whig magnates for Pitt, by Pitt's haughty temper, by the rivalries of the different sections of the Whig party, and perhaps by their reluctance to believe that the King really intended to get rid of them.[1] Pitt resigned because the Cabinet refused to sanction an immediate declaration of war with Spain which had allied itself to France, and an attempt to capture the Spanish treasure fleet—a policy entirely justified by the outbreak of war with Spain a few months later. The other leaders of the Pelham section of the Whigs—Newcastle and Hardwicke—were shortly afterwards compelled to resign. And so, as Burke said, there disappeared "the only two securities for the importance of the people; power arising from popularity; and power arising from connection."[2] Peace was made at Paris in 1763; and just as at Utrecht the desire of Bolingbroke for peace prevented England from getting all the advantages which she might have insisted upon,[3] so at Paris the desire of Bute and our principal negotiator, the Duke of Bedford, for peace, had a similar result.[4] It is true that England increased her possessions in the West Indies, and gained the dominant position in America and India. But the treaty gave her less than she had a right to expect.[5] In Pitt's opinion the restoration to France of her West Indian islands, and the concession of rights in respect of the Newfoundland fishery, gave her the means of recovering her losses, and showed that the government had lost sight of "the great fundamental principle that France is chiefly, if not solely to be dreaded by us in the light of a maritime and commercial power."[6] The peace, he said, would merely sow the seeds of a future war.[7] Pitt protested in vain; and the treaty was forced through a House of Commons which had been skilfully corrupted, and by a disgraceful process of intimidation and proscription applied to all public servants from the highest to the lowest.[8]

[1] "There rankled an incurable alienation and disgust between the parties which composed the administration. Mr. Pitt was first attacked. . . . The other party seemed rather pleased to get rid of so oppressive a support; not perceiving that their own fall was prepared by his, and involved in it. Many other reasons prevented them from daring to look their true situation in the face. To the great Whig families it was extremely disagreeable, and seemed almost unnatural, to oppose the administration of a prince of the House of Brunswick. Day after day they hesitated . . . and were slow to be persuaded, that all which had been done by the cabal was the effect not of humour, but of system," Burke, Present Discontents, Works (Bohn's ed.) i 318; Basil Williams, Pitt ii 62; Camb. Col. Hist. i 480-481.

[2] Present Discontents, Works i 319.

[3] Above 46-47.

[4] Lecky, History of England iii 207-208.

[5] Ibid 213-214.

[6] Parlt. Hist. xv 126.

[7] Ibid 1270.

[8] Lecky, op. cit. iii 225-227.

The treaty was the work of a government which had aroused as much hatred as the government of Pitt had aroused enthusiasm. We have seen that at moments of public excitement the nation could make its voice heard in no uncertain fashion.[1] Riots and disorders all over the country indicated its opinion of the government.[2] The indignation of the nation was largely concentrated upon Bute, who was denounced as a favourite, as the favoured lover of the Princess of Wales, and as a Scotchman. National feeling had, since 1745, been very hostile to the Scotch; and the Scotch birth of many public servants and recipients of royal patronage was made the subject of bitter comment.[3] Moreover, it could hardly escape remark that the methods by which the treaty had been got through Parliament made the royal denunciations of party very unreal; for it was clear that the King was gathering a party around him, and that that party was kept together by methods which followed and exaggerated the methods used by Walpole and Newcastle.

Bute quailed before the storm and suddenly resigned in 1763.[4] There was an abortive negotiation with Pitt; but Pitt plainly told the King that he could not form a government without the help of some members of the old Whig connection—in particular Hardwicke and Newcastle; and the negotiations broke down.[5] Bute's influence still prevailed;[6] and the King found it possible to form a ministry by making use of the rivalries which divided the different sections of the Whig party. He had recourse to the Grenville section. But the Bedford section stood aloof; and the old Pelham connection, Pitt, Grenville's brother-in-law, and Grenville's brother Lord Temple, were in opposition.

Grenville would have made an excellent head of some department in the permanent civil service. He was conscientious and incorruptible, a good financier, a master of the details of public business, and a learned constitutional and Parliamentary lawyer. But he was wholly destitute of the qualities of a statesman—without tact or vision, and intolerably tedious as a speaker;[7] and, "though in principle a republican, he was bold, proud, dictatorial, and so self-willed that he would have expected Liberty herself should be his first slave."[8] The prosecution of Wilkes for his attack upon the government in his famous no. 45 of the *North Briton*, and for his Essay on Woman, and the

[1] Above 84, 85.
[2] Lecky, op. cit. iii 231, 241, 252, 257.
[3] Ibid iii 216-220.
[4] Panic, Horace Walpole wrote, was the real cause of his retirement, Letters (ed. Toynbee) v 304.
[5] Basil Williams, Pitt ii 154-155.
[6] See Walpole, Letters (ed. Toynbee) v 365.
[7] Lecky, op. cit. iii 235-236.
[8] Walpole, Memoirs of George III iv 126.

demonstration of the illegality of the general warrant under which Wilkes had been arrested,[1] increased the unpopularity of the government. Attacks upon it were met by prosecutions for libel which became more and more frequent;[2] and all the influence of the court was used to muzzle the opposition by depriving of their offices those who ventured to vote against the government.[3] At the same time the acquiescence of the ministry in the refusal of Spain to pay a sum due under the Treaty of Paris, and the disorders occasioned in America by the Stamp Act,[4] further weakened the ministry.[5]

Bute and the King had supposed that Grenville would act under their direction;[6] but he had speedily undeceived them. Throughout his ministry the King tried, by intrigues with other sections of the Whig party, to get rid of a minister who was daily becoming more and more obnoxious to him. Grenville bored him with long harangues in the closet, and compelled him to slight his mother by leaving her name out of the regency bill[7] —wholly unnecessarily because the House of Commons promptly inserted it. But the King's failure to form another government put him completely in Grenville's power. He was even compelled to promise never again to have a private interview with Bute, and to dismiss his brother.[8] Pitt refused to take office, and the King, in despair, was obliged to have recourse to the old Whig connection.[9]

The leader of the Whig party, by virtue of his wealth and his connections, was the Marquis of Rockingham. He was a man of tact and judgment, but a hopelessly bad debater and speaker. His administration did some good work in allaying popular discontent at home and in America. General warrants were condemned,[10] and the Stamp Act was repealed.[11] Some useful commercial statutes were passed.[12] But the ministry was weak in personnel, and the King and his party were hostile to it. It would have left little mark in history if it had not been redeemed from mediocrity by the genius of Rockingham's private secretary —Edmund Burke.[13] Rockingham recognized that Burke was the brain of his party, and allowed him to take a large part in

[1] For the various cases connected with the name of Wilkes see below 540, 659-661.

[2] "Two hundred informations were filed against printers: a larger number than had been prosecuted in the whole thirty-three years of the last reign," Walpole, Memoirs of George III ii 15.

[3] "Shelburne and Barré were deprived of their military posts, and Generals Conway and A'Court of their regiments, on account of their votes in Parliament," Lecky, op. cit. iii 258.

[4] 5 George III c. 12. [5] Lecky, op. cit. iii 258. [6] Ibid 261.
[7] 5 George III c. 27. [8] Lecky, op. cit. iii 269. [9] Ibid 270.
[10] Below 667-668. [11] 6 George III c. 11.
[12] Lecky, op. cit. iii 271-272; vol. xi 416, 423, 449.
[13] The most complete modern life of Burke is R. H. Murray's Biography, to which I owe much.

the shaping of its policy.[1] Throughout his life he was warmly attached to him, lent him at various times no less a sum than £30,000, and, at his death, directed his executors to cancel these debts.[2] At this point I must say a few words about a man who left a deep mark upon the history of the last half of the eighteenth century, and a still deeper mark upon the political philosophy of his own and of the succeeding centuries.

Burke is perhaps the greatest political philosopher in the whole course of English history.[3] He was also a great orator, and had many of the gifts of a great statesman. But it is as a political philosopher that he has won immortality. In an age which was inclined to despise the past, and to apply to the solution of its problems its own transient political theories and ideas,[4] Burke was almost the only other thinker, besides Montesquieu and Blackstone, who saw that the present age was the outcome of the past, that the merits and defects of its institutions and its laws could not be appreciated without some reference to their history, and that therefore present problems could not be understood except in the light of their history.[5] This historical sense, coupled with a wide historical reading, made him acutely conscious of the difficulty of creating a civilized and ordered society, and impressed upon him a deep and almost mystic reverence for any set of institutions and laws which showed themselves able to master those anarchical forces which are ever threatening the existence of such a society.[6] Naturally he emphasized the necessity of

[1] Lord Buckinghamshire, writing to Grenville in June 1766, said that Burke was not only Rockingham's right hand, but both his hands, cited R. H. Murray, op. cit. 132; his position was the same in the succeeding years of opposition; in 1773 the Duke of Richmond said, "Burke, you have more merit than any man in keeping us together," ibid 222.

[2] Ibid 160.

[3] In 1790 Fox said, "if all the political information I have learned from books, all which I have gained from science, and all which any knowledge of the world and its affairs has taught me, were put in one scale, and the improvement which I have derived from my right honourable friend's instructions and conversations were put in the other, I should be at a loss to decide the preference," Parlt. Hist. xxviii 364.

[4] "Voltaire, Hume, and Gibbon agree in exhibiting that contempt for the past which forms one of the gravest of the blots upon the thinkers of the eighteenth century," R. H. Murray, op. cit. 78.

[5] For his appreciation of Montesquieu see Appeal from the New to the Old Whigs, Works (Bohn's ed.) iii 113.

[6] "To him there actually was an element of mystery in the cohesion of men in societies, in political obedience, in the sanctity of contract; in all that fabric of law and charter and obligation, whether written or unwritten, which is the sheltering bulwark between civilization and barbarism. . . . One of the reasons why he dreaded to see a finger laid upon a single stone of a single political edifice, was his consciousness that he saw no answer to the perpetual enigma how any of these edifices had ever been built, and how the passion, violence, and waywardness of the natural man had ever been persuaded to bow their necks to the strong yoke of a common social discipline," Morley, Burke 165, 166; cp. Murray, op. cit. 368.

maintaining the religious basis of the state ; [1] and it was because " the new fanatical religion of the rights of man " menaced the old-established order in church and state, which was founded upon Christianity, that he feared and hated it.[2] Naturally also he was impressed by the complexity of a civilized society, and therefore by the need for complex arrangements if justice was to be secured for its various members.[3] To his mind, a civilized society had in it elements of divinity ; for it was

> a partnership in all science ; a partnership in all art ; a partnership in every virtue, and in all perfection ;

and,

> as the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those that are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primeval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a final compact sanctioned by an inviolable oath which holds all physical and moral natures ; each in their appointed place.[4]

This is a conception of the state which in its idealism is equalled only by Hooker.[5] It is on this great idealistic conception that all Burke's political philosophy was based.

It followed that Burke distrusted all the abstract formulæ, constructed by lawyers or political philosophers, and all their metaphysical discussions of rights. To his mind the history and the present circumstances of any given question were the matters first to be considered ; and, since the history and circumstances of any given question were infinitely various, principles must be modified in their application to them, if a just solution was to be reached.[6] Those who reasoned from abstract principles, without giving due weight to history and present circumstances, were, in his opinion, " metaphysically mad." [7] He approached all the great questions of his day, and more

[1] In 1773 Burke said that " the most horrible and cruel blow that can be offered to civil society is through atheism," Speech on a Bill for the Relief of Dissenters, Works (Bohn's ed.) vi 112 ; in his Reflections on the French Revolution (Works (Bohn's ed.) ii 365) he said, " all persons possessing any portion of power ought to be strongly and awfully impressed with an idea that they act in trust ; and that they are to account for their conduct in that trust to the one great Master, Author and Founder of society."

[2] " It is the new fanatical religion, now in the heat of its first ferment, of the Rights of Man, which rejects all establishments, all discipline, all ecclesiastical and in truth all civil, order, which will triumph, and which will lay prostrate your church ; which will destroy your distinctions, and which will put all your properties to auction, and disperse you over the earth," Works (Bohn's ed.) vi 70, letter to R. Burke, cited Murray, op. cit. 102-103.

[3] French Revolution, Works (Bohn's ed.) ii 334-335.

[4] Ibid 368-369, cited vol. vi 280 n. 8.

[5] Vol. vi 280 n. 8 ; vol. iv 212-213.

[6] R. H. Murray, op. cit. 359

[7] Speech May 11, 1792, Works (ed. Bohn) vi 114.

especially all constitutional questions, from this point of view. He was a friend to ordered liberty, and to necessary reforms in the law ; [1] but he was an enemy to all reforms which would shake the foundation of the eighteenth-century constitution, such as a reform of Parliament on the lines advocated by the Bill of Rights Society.[2] This method of approach determined his attitude to America. He refused to entangle himself in a barren controversy as to legal right, and argued the question on the basis of what was expedient and what was possible, in the new circumstances created by the growth to maturity of the American colonies.[3] It also determined his attitude to India. He was persuaded by Philip Francis to believe that Warren Hastings was an oppressor, who had overturned an ancient civilization, and had violated the principle that all political power is in the nature of a trust to secure the welfare of the governed.[4] Above all, it determined his attitude to the French Revolution. He was the first person in Europe to gauge its true character,[5] to see in it the rise of a new set of opinions, universal in their application, which set out deliberately to break with the past, to destroy the civilization which he knew and idealized, and to subvert the religion on which that civilization was founded.[6]

Morley said of his American speeches and of his letter to the sheriffs of Bristol that " they compose the most perfect manual in our literature, or in any literature, for one who approaches the study of public affairs, whether for knowledge or for practice." [7] This is true of nearly all his writings and speeches, because they are founded on an analysis of the problem dealt with, which could be made only by a man who combined the imaginative insight into the past possessed by a great historian, with the insight into the needs of the present possessed by a man of affairs with a genius for statesmanship. And the fact that this is true is proved by the acid test of the correctness of his political

[1] Thus he advocated a measure to give the jury the power to return a general verdict in a prosecution for libel, below 689 ; a measure of emancipation for the Roman Catholics, below 114 ; reforms in the criminal law, Murray, op. cit. 247.

[2] Below 102, 115 ; Murray, op. cit. 315 ; for his hostility to " the Bill of Rights people " see ibid 190 ; probably the aversion to any kind of Parliamentary Reform had something to do with his opposition to the idea that the American colonies should be represented in Parliament, vol. xi 128 ; as Mr. Murray says, op. cit. 357, " from first to last he fought for the reform or improvement of society ; but he would let it go unreformed or unimproved—if reform and improvement meant radical reformation " ; cp. above 93 n. 6 ; Horace Walpole was of the same opinion ; in 1770 he wrote, Letters (ed. Toynbee) vii 359, " Lord Chatham . . . has thrown out, that *one member more ought to be added to each county ;* so little do ambition and indigence scruple to strike at fundamentals ! "

[3] Vol. xi 127-128.

[4] Ibid 197.

[5] Murray, op. cit. 349-351 ; for Horace Walpole's appreciation of Burke's book, see Letters xiv 314.

[6] Murray, op. cit. 353, 357, 401 ; above 94 ; below 124.

[7] Burke 81.

prophecies. It is safe to say that Burke has made a greater number of correct prophecies, based upon his analysis of current events, than any other political thinker.[1]

Goldsmith regretted that one,

> Who born for the Universe, narrowed his mind,
> And to party gave up what was meant for mankind.

Fundamentally this is not true. In his great speeches he put the matters in issue on a high philosophical plane, and educated and delighted not only posterity, but his auditors.[2] But there is a sense in which it is true. All his speeches were not on this high level, and he sometimes bored and even disgusted his hearers ;[3] for he had the defects of his great qualities. He was too liable to be carried away by his feelings in his championship of a cause which appealed to him, and sometimes, owing to his party[4] or his personal[5] prepossessions, he championed the wrong cause. And yet, although he gave up very much to his party, he never attained cabinet rank. This was probably due to a variety of causes. It was due to faults of temper. It was due to the fact that a genius who lives in the world of his own ideas, is not an easy colleague to work with.[6] It was due to his straitened

[1] For his predictions as to the course taken by the French Revolution see Murray, op. cit. 381 ; for his prophecy that England would be obliged to go to war with France, and take a leading part in the war, see ibid 380-381 ; for his prophecy of the length of the war see ibid 357 ; for his prophecy of the rise of a Napoleon see ibid 368-369 ; for his statement in 1784 that he would not be surprised if some of the Southern States seceded from the Union see ibid 313 ; Horace Walpole, Letters xiv 161, thought that the Revolution would be merely a "temporary paroxysm" ; on the other hand, he prophesied the rise of a Napoleon, ibid 208.

[2] Of his speech on American taxation in 1774 Lord John Townshend said, "Good God ! what a man this is ! how could he acquire such transcendent powers?" Murray, op. cit. 230 ; Lecky, History of England iii 393-395 ; in a debate on America in 1775, "he turned, twisted, metamorphosed, and represented everything which the right honourable gentlemen had advanced into so many ridiculous forms that the House was kept in a continual roar of laughter," Parlt. Hist. xviii 173.

[3] One instance is his violence in the Regency debates, Morley, Burke 140-141, another is his conduct when attacked for reinstating Powell and Bembridge, ibid 102 ; below n. 5 ; but there were occasions on which even Pitt failed to hold his audience, see Horace Walpole, Letters (ed. Toynbee) iii 403.

[4] "Burke the philosopher of politics did not help the politician to the extent one might at first sight imagine. Burke the politician intrigued with Fox and North for place and power, he listened to the tales Francis concocted to the discredit of Warren Hastings, he thundered about the Rohilla war and the extermination of the Rohillas though there was neither a Rohilla nation nor an extermination, and he forgave Fox his career of faction to quarrel with him on his attitude to the French Revolution. Acts like these divorced the philosopher of politics from the politician, and this divorce inflicted the gravest of blows on the career of Edmund Burke," Murray, op. cit 299.

[5] For instance his reinstatement and defence of two fraudulent clerks in his office—Powell and Bembridge, see Murray, op. cit. 303-304.

[6] Fox once said that he was an impracticable person and unmanageable colleague, and there is a good deal of evidence that he lacked the ability to "lay his mind alongside another's," see Murray, op. cit. 294-295 ; this was the view of the late Lord Lansdowne, who was a repository of much Whig tradition, Morley, Burke 141.

pecuniary circumstances,[1] to the not too good reputation of his entourage,[2] to the unjust suspicion that he had Roman Catholic sympathies,[3] and perhaps, to some extent, to his want of aristocratic connections.[4] These minor defects, these considerations which bulked so large in the eyes of contemporaries and bulk so small in the eyes of posterity, deprived Burke of the rewards which fall to the lot of much smaller men. But for us, and for the best minds of his own day, he was as great in his sphere of political philosophy as Pitt was in his sphere of practical statesmanship and inspired speech. Because Great Britain neglected his counsels she lost a large part of that old empire in America which Pitt's statesmanship had secured and consolidated: because she followed those counsels more and more closely in later years she retained the new empire in other parts of the world which she afterwards acquired. In this respect the succeeding age became gradually wiser than the age to which Burke spoke. But in another equally important respect it gradually became as foolish. The lessons which Burke drew from his analysis of the dangers inherent in an absolute and uncontrolled democracy, convey a series of warnings as much needed by our own age, as his warnings of the dangers inherent in the policy pursued with respect to America were needed by his own—and they have come to be as much neglected.

But we must return to the short administration of Rockingham, during which Burke made his name in Parliament. The fact that Pitt refused to join it was fatal to its permanence. This was perhaps the greatest mistake that Pitt ever made. If he had joined it it might have been able to stand against the royal intrigues, and it might have been able to settle that American question, which was rapidly becoming the outstanding political question of the day. There were no serious differences between Pitt and Rockingham on political questions; and Rockingham was ready to meet Pitt more than half-way.[5] The principal reason for Pitt's refusal to join the ministry was his rooted objection to allying himself to a party, and especially to a party which represented the old Whig connection of Walpole and the Pelhams.[6]

It was because the Rockingham ministry represented this old Whig connection that the King was from the first hostile to it, and was induced with difficulty to consent to the repeal of

[1] Murray, op. cit. 290-291. [2] Ibid 291. [3] Ibid 292-293.

[4] See Turberville, The House of Lords in the XVIIIth Century 323; but as Murray points out, op. cit. 290, three prime ministers, Addington, Jenkinson, and Canning, were no better born than Burke; cp. Namier, Structure of Politics. 14-15; probably Burke's humble birth would not have stood in his way if it had not been combined with the other reasons above mentioned.

[5] Lecky, op. cit. iii 277-280. [6] Ibid 281, 282-283.

the Stamp Act. He thwarted it at every turn; and, the resignations of Grafton and Northington were made the occasion for its dismissal.[1] The King turned to Pitt. We have seen that the King agreed with Pitt in his dislike of party [2]—but for very different reasons. Pitt therefore in 1766 agreed to take office; and he constructed a ministry composed of men of the most various opinions. But his ministry never had a chance of success. In the first place, Pitt became a peer with the title of Earl of Chatham; and this deprived him of his power of controlling the House of Commons and of much of his popularity.[3] In the second place, Chatham, shortly after he took office, became mentally incapacitated. Then the confusion became complete—the ministry "was divided into as many parties as there were men in it."[4] In 1768 Chatham persuaded the King to accept his resignation; and a bargain was struck with the Bedford faction. Lord North joined the ministry as Chancellor of the Exchequer; and when in 1770 the ministry was reconstructed, he succeeded Grafton as first lord of the Treasury. George III had at length found a minister who consistently supported the authority of the Crown, and was willing to submit to its control.[5] He had at length achieved his object of "being a King".

George III's character had developed during the ten years which had elapsed since his accession to the throne. He had many good qualities. He was moral, religious, and industrious, a good son, and a good husband. He was courageous, as he showed by his conduct at the time of the Gordon riots, when he summoned the Privy Council, got a legal opinion that the soldiers could fire on the mob, and insisted that the order to fire should be given. Unfortunately he had a narrow mind and an obstinate temper—qualities which the mental disease which afflicted him in his later years intensified. That mind and that temper were directed to the single object of making himself King by destroying the power of the Whig clans. To its attainment he gave infinite pains,[6] and a considerable natural ability which had been

[1] Lecky, op. cit. iii 276-277.

[2] Above 89; in 1766 the King wrote, "I know the Earl of Chatham will zealously give his aid to destroying all party distinctions and restoring that subordination to Government which alone can preserve that inestimable Blessing Liberty from degenerating into Licentiousness," Fortescue, Correspondence of George III i 385.

[3] Chesterfield wrote (August 1, 1766), "the joke here is, that he has had *a fall upstairs*, and has done himself so much hurt, that he will never be able to stand upon his legs again"; Walpole wrote, Letters (ed. Toynbee) vii 32, that "the City and the mob are very angry"; cp. ibid Suppl. i 140.

[4] Lecky, op. cit. iii 308. [5] Ibid iii 313-314, 355.

[6] This is shown by the way in which he scrutinized division lists, and the care with which he gave his patronage; thus in 1779 he writes to North, "I wish to see the list of defaulters who have either Employments or Military Governments," Fortescue, Correspondence of George III iv 302; later he writes, "I hope the friends of Government will by the little repulse of last night learn to be less hasty in quitting the House," ibid 316.

sharpened by contact with affairs and by concentration on this single purpose. Its attainment meant the establishment of his own personal government. But personal government in the England of the eighteenth century could only have been endurable if the King who wielded it had had something approaching to Chatham's genius as a statesman; and it is not too much to say that George III had no one of the higher gifts of statesmanship. "His capacity," it has been truly said, "did not extend beyond the arts of obtaining power"; [1] and his exclusive attention to those arts made him unable to appreciate genius, to understand his subjects, or to interpret the main currents of development in Great Britain and her overseas possessions. The fact that he could call Chatham "a trumpet of sedition," [2] and that, on Chatham's death, the vote of a monument and a public funeral surprised and offended him,[3] is characteristic of his narrow understanding, and his sullen temper, which never forgot or forgave opposition to his dominant ambition [4]—an ambition which he had persuaded himself was in the best interests of the country.[5] Hence the fact that, to a large extent, he attained his object of making himself King, had some very evil effects upon the fortunes of Great Britain and upon English public law. He antagonized his subjects at home by supporting all the arbitrary acts of a Parliament which he had learned to control, and by resisting all attempts to remedy the defects in the procedure and constitution of the House of Commons, because it was upon those defects that this control largely depended.[6] He antagonized his subjects in America by a complete lack of vision as to the essential elements of the problem of Great Britain's relation to her colonies.[7] He frustrated any chance of a settlement of the Irish problem by his obstinate religious bigotry.

Shortly after Chatham's illness compelled him to retire temporarily from public life, the government had roused the country by its treatment of Wilkes, and had sown the seeds of the American war of Independence by the imposition of import duties. The prosecution of Wilkes in 1763 for his article in no. 45 of the *North Britain*, and his arrest under a warrant which

[1] Anson, Introd. to Grafton's autobiography xiv.

[2] Fortescue, Correspondence of George III iii 242; cp. ibid 449; iv 59-60.

[3] Basil Williams, Pitt ii 331.

[4] It is characteristic that the victory of the Fox-North coalition affected him more deeply than any of the other misfortunes of his reign, below 110 n. 6.

[5] "I have no wish but for the Prosperity of my Dominions therefore must look on all who will not heartily assist me as bad men as well as ungrateful Subjects," Fortescue, Correspondence of George III vi 151.

[6] In 1775 he naïvely says in a letter to North, "if the Opposition is powerful next Session it will much surprize me for I am fighting the Battle of the Legislature, therefore have a right to expect an almost unanimous Support," Fortescue Correspondence of George III iii 256.

[7] Below 104.

was illegal because it was general, had made him a popular hero.[1] The manner in which, in 1769, the House of Commons overrode the rights of electors of Middlesex, by declaring that Wilkes's expulsion from the House rendered him incapable of re-election, and that the candidate who was in a hopeless minority was duly elected,[2] infuriated the nation and added to Wilkes's popularity. At the same time the feelings of the nation were more than adequately expressed by the savage invective of Junius against the King and his ministers. Their conflict in 1771 with Wilkes and the City of London, over the arrest of certain printers for publications reflecting upon members of the House of Commons, led the House to commit acts which were even more indefensible.[3] As Junius tersely and truly said, " they have advised the King to resume a power of dispensing with the laws by royal proclamation. . . . By mere violence and without the shadow of right, they have expunged the record of a judicial proceeding. Nothing remained but to attribute to their own vote a power of stopping the whole distribution of criminal and civil justice." [4]

Chatham's return to public life in 1770 added to the difficulties of the ministry. He attacked them for their proceedings on the Middlesex election, and he attacked them for their policy of taxing America. Too late he saw his mistake in combining with the King to destroy party.[5] In the description which he gave in 1770 of the good qualities of George II it is impossible not to see an implied reflection on the character of his grandson.[6] In these circumstances the different sections of the Whig party began to draw together.[7] But, in spite of all its difficulties, the government weathered the storm. George III had done his work too well. As Burke said in 1770, " the power of the Crown almost dead and rotten as prerogative has grown up anew, with much more strength and far less odium, under the name of influence." [8] His party was supreme in both Houses ; and he had secured in North a prime minister with considerable debating power and business capacity, witty, good tempered, and, above all, ready to submit to his control.[9] The popular excitement

[1] Below 659-661.

[2] Below 540 ; in 1782 the House of Commons expunged its resolution incapacitating Wilkes from sitting after re-election, below 544.

[3] Below 548. [4] Letters of Junius (1st ed.) ii 166. [5] Lecky, op. cit. iii 359.

[6] " The late good old king had something of humanity, and amongst many other royal and manly virtues, he possessed justice, truth, and sincerity, in an eminent degree ; so that he had something about him, by which it was possible for you to know whether he liked you or disliked you," Parlt. Hist. xvi 849-850.

[7] Lecky, op. cit. iii 361-364.

[8] Present Discontents, Works (Bohn's ed.) i 313.

[9] Burke said of him in 1796, " he was a man of admirable parts ; of general knowledge ; of a versatile understanding fitted for every sort of business ; of infinite wit and pleasantry ; of a delightful temper ; and with a mind most perfectly disinterested. But . . . he wanted something of the vigilance and spirit of command that the time required," Works (Bohn's ed.) v 117.

died down—" *Fuit Ilium*," wrote Chatham in 1771, " the whole constitution is a shadow." [1]

It was by making a skilful and ruthless use of the anomalous state of the representation in the unreformed House of Commons, of the royal patronage, and of corruption, that the King had obtained the dominating influence both in the House of Lords and the House of Commons, and had thus realized his object of " being King." As Burke pointed out,[2] the King and his ministers were able to use the sovereignty of Parliament to cover all their misdeeds.

> Those who will not conform their conduct to the public good, and cannot support it by the prerogative of the crown, have adopted a new plan. They have totally abandoned the shattered and old fashioned fortress of prerogative, and made a lodgment in the stronghold of Parliament itself. If they have any evil design to which there is no ordinary legal power commensurate, they bring it into Parliament. In Parliament their object is executed from beginning to end. In Parliament the power of obtaining their object is absolute ; and the safety in the proceeding perfect ; no rules to confine, no after reckoning to terrify. Parliament cannot, with any great propriety, punish others for things in which they themselves have been accomplices.

Naturally the nation lost respect for a body which merely registered the edicts of the ministers, and trampled on the rights of the people.[3] Equally naturally it showed its resentment by libellous addresses and petitions to the King, by disorderly assemblies and riots, and by attacks in the press. " The people remain quiet," said Burke in 1771, . . . " when they imagine that the vigilant eye of a censorial magistrate watches over all the proceedings of judicature ; and that the sacred fire of an eternal constitutional jealousy, which is the guardian of liberty, law and justice, is alive night and day, and burning in this House. But when the magistrate gives up his office and his duty, the people assume it, and they inquire too much, and too irreverently, because they think their representatives do not inquire at all." [4]

On previous occasions in the course of the eighteenth century—on the fall of Walpole and on the resignation of Pitt in 1757 [5]—the nation had shown that it could make its voice heard. But

[1] R. H. Murray, Burke 367, citing the Chatham Correspondence iv 259

[2] Present Discontents, Works i 350.

[3] " If the authority of Parliament supports itself, the credit of every act of government which they contrive is saved : but if the act be so very odious that the whole strength of Parliament is insufficient to recommend it, then Parliament itself is discredited ; and this discredit increases more and more that indifference to the constitution, which it is the constant aim of its enemies, by their abuse of Parliamentary powers, to render general among the people," ibid.

[4] Speech on a Bill proposed in 1771 to explain the Powers of Juries in Prosecutions for Libel, Works (Bohn's ed.) vi 158.

[5] Above 75, 91.

under the first two Georges "the Whig Government usually succeeded so well in avoiding collisions with public opinion that the outbursts against it were rare, transient, and feeble." [1] But now the danger to the constitution was so manifest, and the agitation was so widespread that it produced more important results. It was obvious that the degradation of Parliament was the root of the evil; and it was equally obvious that that degradation was due to corruption and to the anomalous state of the representation. The danger to the constitution, which the attitude of the House of Commons on the question of general warrants, and on the question of the Middlesex election, had made manifest, produced in 1769 the foundation of the Society of the Supporters of the Bill of Rights; [2] a popular movement in favour first of economic and then of Parliamentary reform; [3] proposals for shortening the duration of Parliament; [4] proposals for Parliamentary reform by Chatham in 1770, by Wilkes in 1776, and by Pitt in 1783; [5] and the growth of the idea, against which Burke protested,[6] that members of Parliament should consider themselves bound by mandates and authoritative instructions from their constituents. It also produced a purified Whig party, which was the first "formed opposition" to the Crown which this century had seen.[7] This development was, as we shall see, the condition precedent to the growth of our modern system of Cabinet government.[8]

This Parliamentary tyranny, which was the result of George III's success in establishing his personal rule, was the principal cause of the American war of independence.[9]

Acute observers had prophesied that the removal of the French menace in America would produce a demand for independence. In fact, Vergennes accurately forecasted the cause for and the occasion of this demand. He said that England would call on

[1] Lecky, op. cit. iii 368.

[2] Walpole, Memoirs of George III iii 339; G. S. Veitch, The Genesis of Parliamentary Reform 29.

[3] Ibid 58-102; Lecky, op. cit. iii 372-375.

[4] The corruption of Parliament gradually converted Chatham to the view that the Septennial Act must be repealed, ibid 379-380.

[5] G. S Veitch, The Genesis of Parliamentary Reform 44-46; that the nation was being aroused by the disasters of the American war is shown by the numerous references in Walpole's Last Journals to county committees and associations formed to advocate economic and Parliamentary reform, see Last Journals ii 359, 371-373, 374-375, 378-379, 389-390, 441-442, 492, 620.

[6] Works (Bohn's ed) i 447-448. [7] Above 60-62. [8] Below 642-643.

[9] "Both the oppression of Ireland and the oppression of America were the work of . . . men who executed one King and expelled another. It was the work of Parliament . . . Parliament would not consent to renounce its own specific policy, its right of imposing taxes. The Crown, the clergy, the aristocracy, were hostile to the Americans; but the real enemy was the House of Commons. The old European securities for good government were found insufficient protection against Parliamentary oppression," Acton, Lectures on Modern History 309

the colonies to share the cost of her victories ; and that, as they no longer needed her protection, they would declare their independence.[1] Those rare prophecies which are fulfilled always obtain celebrity. Though the correctness of this prophecy was proved by the event, its fulfilment was by no means inevitable. The relation of England to the American colonies had become very difficult, both as the result of Pitt's conquests and as the result of their own growth, but it was not an insoluble problem ;[2] and it might have been solved if the views not only of such statesmen as Chatham[3] and Burke,[4] but also of many other lesser men,[5] had prevailed.

Of the legal and constitutional questions which were raised by the claims of the American colonies I shall speak more at length later.[6] Here it will be sufficient to say that both sides could make a case. England might fairly claim that the colonies should help to pay the cost of the war which relieved them of the French menace, and gave them the opportunity for expansion ; and there is no doubt that, according to the letter of the law, Parliament could both legislate for and tax the colonies. On the other hand, the Americans contended with much force that England was amply remunerated by the Navigation Acts and Acts of Trade, which regulated the commerce of America to the advantage of England ;[7] and that, whatever the legal rights of Parliament might be, taxation by an assembly in which they were not represented was tyranny.[8] The truth which few statesmen, except Burke[9] and to some extent Horace Walpole,[10] clearly saw, was the fact that the problem was a new problem, which could not be argued merely as a question of legal right,

[1] Cited Camb. Col. Hist. i 649. Turgot had said that "America, as soon as she can take care of herself, will do as Carthage did," ibid.

[2] "There was no tyranny to be resented. The colonists were in many ways more completely their own masters than Englishmen at home. . . . The point at issue was a very subtle and refined one, and it required a great deal of mismanagement to make the quarrel irreconcilable," Acton, op. cit. 309.

[3] Vol. xi 125. [4] Ibid 126-128.

[5] Ibid 105-107, 126. [6] Ibid 116-124.

[7] This was Pitt's view, Parlt. Hist. xvi 105-106, who said in 1766 that when he was in office he had rejected proposals to tax America ; it was also Chesterfield's view ; he wrote in 1765, "the opposition are for taking vigorous, as they call them, but I call them violent measures ; not less than *les dragonades ;* and to have the tax collected by the troops we have there. For my part I never saw a froward child mended by whipping ; and I would not have the mother country become a stepmother. Our trade to America brings in, *communibus annis*, two millions a year ; and the Stamp duty is estimated at but one hundred thousand pounds a year ; which I would, by no means, bring into the stock of the Exchequer, at the loss, or even the risk, of a million a year to the common stock," Letters to his Son (ed. 1774) ii 495-496 ; this was also the view of Horace Walpole—he said of Grenville's Stamp Act that "to realize farthings he set both countries at variance," Memoirs of George III i 390 ; see also ibid ii 71.

[8] Vol. xi 117. [9] Ibid 126-128.

[10] Memoirs of George III ii 73-77.

nor as a merely fiscal or economic question. The colonies had become mature communities of Englishmen. They claimed and rightly claimed the laws and liberties of Englishmen. What their relation to the mother country should be could only be settled on equitable and political principles based on their actual situation. Talk about legal rights and the sovereignty of Parliament led to no result. It merely embittered the controversy.

Burke's great speeches on America tried to impress this lesson on the House of Commons; and though the adoption of his principles enabled this country in the late eighteenth and the nineteenth centuries to create and to retain a new colonial empire, in his own day they fell on deaf ears. George III, and the great majority of the Parliament which he controlled, could see only the narrow issue of legal right; and they were convinced, and convinced the nation, that the only way in which they could make their conception of legal right prevail was by force.[1] America answered by the Declaration of Independence. Though, as Burke admitted,[2] the majority of the nation supported the war, it was only a majority.[3] There was still a Whig opposition, which grew larger as, after the intervention of France, Spain, and Holland, the hopelessness of the contest became evident. Though the King's ministers knew very well that the struggle was hopeless, the King was determined not to yield; and he could make his will prevail, because he could still command a majority in the House of Commons. Therefore the opposition in 1779-1780 concentrated upon the real source of the King's personal government—the manner in which Parliament was corrupted by the multiplication of places, sinecures, and pensions; and they were supported by petitions from many counties and cities.[4] In 1780 Dunning carried his famous resolution that "the influence of the Crown has increased, is increasing, and ought to be diminished"; [5] and Burke introduced a scheme of economic reform in a speech which is remarkable not only for its wit and eloquence, but also for the light which it shed upon those curious mediæval survivals which pervaded very many of the branches of the executive government,[6] in the same way that they pervaded the courts of law and equity.[7] The bill was ultimately lost; but

[1] See, for instance, Fortescue, Correspondence of George III iii 59, 156.

[2] Correspondence ii 48; Lecky, op. cit. iv 436-437; Horace Walpole wrote that at the outset the war was popular, Letters (ed. Toynbee) ix 164, 245, 265.

[3] "It was not a case of colonists unanimous in rebellion opposing a kingdom unanimous in its determination to impose its will upon them. The conflict was not so much a struggle between England and America as a civil war in which the whole British race took sides," Camb. Col. Hist. i 761; Lecky, op. cit. iv 353; Horace Walpole was a consistent supporter of the American cause, because, he said, he was "a zealot for liberty in every part of the globe," Letters (ed. Toynbee) ix 244.

[4] Lecky, op. cit. v 93-96.

[5] Ibid 96.

[6] Below 492-493, 521.

[7] Vol. i 246-264, 423-425, 439-442.

the divisions upon it showed that the opposition was gaining ground. Defeats and failures by land and sea in 1781-1782 finally compelled Lord North's government to resign in 1782.

Chatham, till his death in 1778, and the Rockingham Whigs had supported the opposition; and, since 1774, they had been joined by Charles James Fox, who soon proved to be their most effective leader. He was the son of Henry Fox, first Lord Holland, an able and unscrupulous politician. Henry Fox had amassed a great fortune as paymaster of the forces during the seven years' war; and, by the usual corrupt means, he had secured the assent of the House of Commons to the Treaty of Paris. His son had at first followed his father's footsteps, had attached himself to the Tory party, and had defended all its most indefensible measures.[1] But he finally deserted that party in 1774; and, by reason of his extraordinary powers of oratory and debate, he had become the leader of the opposition in the House of Commons. That he should have left so great a name in English constitutional history is a very curious phenomenon. He was at once a gambler and a profligate—"the soul of a group of brilliant and profligate spendthrifts who did much to dazzle and corrupt the fashionable youth of the time"; [2] and a scholar with a genuine love of literature.[3] Though he was the finest debater and one of the finest orators of his time, he was not a profound political thinker nor had he the qualities of a statesman. He had neither Burke's appreciation of Montesquieu nor Pitt's appreciation of Adam Smith.[4] He was a party man, who applied all his talents to the advocacy of the party with which he was at the time connected, and went all lengths in that advocacy, without heed to the consequences.[5] The manner in which he attacked Lord North,[6] his rejoicings at the successes of the Americans,[7] and, at a later period, at the successes of Napoleon,[8] his famous coalition with Lord North,[9] deprive him of all claim to be a serious

[1] Lecky, op. cit. iv 260.
[2] Ibid 254.
[3] See R. H. Murray, Burke 174-175.
[4] Lecky, op. cit. iv 251.
[5] Thus in 1782, after a bitter attack on Shelburne, he predicted that Shelburne might even ally himself with North to keep himself in power—not foreseeing that, within a short period, he would be doing that very thing, Wraxall, Historical Memoirs ii 233.
[6] "During the whole course of the American war the chief interest of English parliamentary politics had lain in the furious attacks which Fox had made upon North, and those attacks had been of such a nature that many considered it to be a shameful instance of tergiversation that he had not, on arriving at power, insisted on bringing his predecessor to a public trial," Lecky, op. cit. v 209.
[7] Thus, he described the first success of the English in America as "the terrible news from Long Island," ibid iv 439.
[8] Fox wrote to Grey in 1801, "the triumph of the French Government over the English does in fact afford me a degree of pleasure which it is very difficult to disguise," Correspondence iii 349, cited Lecky, op. cit. vii 173 n. 1; cp. Davis, Age of Grey and Peel 42.
[9] Below 110.

statesman; for they show, as his friend Selwyn said, that he had neither judgment, conduct, or character.[1] Fanny Burney tells us that Fox, on being shown a passage from Burke's "Reflections on the French Revolution" which he had controverted, but which had turned out to be true, said, "well, Burke is right—but Burke is often right, only he is right too soon." As Mr. Murray rightly says, "it was the answer of a politician, not the answer of a statesman."[2]

The reasons why he has left so enduring a reputation in English history are mainly three. In the first place, his extraordinary personal charm, added to the power and the grace of his oratory,[3] ensured the devoted attachment of his followers,[4] and so disarmed his opponents that they minimized his shortcomings. When the younger Pitt was asked how it was that a man of so little character could have so great an influence, he replied, "you have not been under the wand of the magician."[5] In the second place, his ill-digested belief in the inherent virtue of individuals or nations, provided that they were not corrupted by bad governments or a corrupt society, his faith in freedom from all restraints of speech or action, his opposition to all restraints on this freedom even in a time of national emergency, his habit of appealing to public opinion outside Parliament,[6] were the creed of those new Whigs who came into power in 1832.[7] They naturally regarded him as their spiritual father, magnified his

[1] Cited Whibley, Political Portraits 147; Horace Walpole says, "he acted as the moment impelled him; but as his conception was just, and his soul void of malice or treachery, he meditated no ill, but might have advantaged himself and his country more had he acted with any foresight or plan," Last Journals ii 561; on the other hand in 1782 Horace Walpole thought that he would make a good Prime Minister, Letters (ed. Toynbee) xii 244, 284; Gibbon wrote in 1788, "will Fox never know the importance of character," Letters ii 180.

[2] R. H. Murray, Burke 386, citing Madame D'Arblay, Diary and Letters (ed. Dobson) v 92.

[3] "No man ever exceeded him in closeness of argument, which flowed from him in a torrent of vehemence, as declamation sometimes does from those who want argument. . . . Without that conciliating jocoseness, and without the exuberant imagery of Burke, Fox's allusions were beautiful and happy, and he often possessed that superior kind of wit which, without being sought, results from the clearness of ideas and knowledge of the world, and which comes by intuition and not by fancy," Walpole, Last Journals ii 560.

[4] Thurlow once said, "there are only forty of them but they would all be hung for Fox," R. H. Murray, Burke 175.

[5] Rosebery, Pitt 43; similarly Gibbon, though he deplored his want of character, testifies to the affection which his personal fascination inspired; "I grieve," he said in 1793, "that a man whom it is impossible for me not to love and admire, should refuse to obey the voice of his country," Letters ii 372; and cp. ibid 251.

[6] Wraxall, Memoirs ii 250, says, "however violent he might be in his place, Burke never carried his complaints to the people. But Fox, who acted no less as a Demagogue, than as the Representative of Westminster . . . anxious to appeal from his late dismission (in 1782) by the King, to the popular suffrage, convoked his constituents, in order to lay before them the reasons for his resignation."

[7] H. W. C. Davis, The Age of Grey and Peel 42-47.

merits, and minimized his defects. In the third place, the fact that he assumed the leadership of the new Whigs when the great split in the Whig party occurred at the time of the French Revolution,[1] the fact that he never lost faith in his party during long years of hopeless opposition, gave him a special claim to the protection of the historians of that party; and those historians were long the dictators of English historical thought. They handsomely paid the party debt. Regarding the party which Fox led as the direct successor of the Whig party which had achieved the Revolution of 1688, they made Fox the chief link in the chain of descent; and, aided by his undoubted personal charm and oratorical talents, usually the most fugitive of qualities, they have attributed to him a character for statesmanship which is as dubious as the pedigree which they have constructed for the party which he led.

Though, for many years to come, the King and his friends were able to exercise considerable influence, the resignation of Lord North marks the end of their reign. The Whigs under Lord Rockingham again came into power. Thurlow remained in office as Lord Chancellor; but, for the rest, the ministry was composed of the leaders of the Whigs—Fox, Burke, Camden, and Shelburne. It was not a strong ministry. The King and all his connection were hostile to it; and Thurlow opposed many of its measures in the House of Lords. Shelburne on some points, e.g. on Parliamentary reform, differed from his colleagues; and on others, e.g. on economic reform, his differences with his colleagues caused him to side with the King and Thurlow.[2] But, in spite of all these disadvantages, it accomplished much.

In the first place, it diminished the power of the Crown to exercise a corrupt influence over Parliament by statutes which excluded contractors [3] from the House of Commons and disenfranchised revenue officers; [4] and, in the teeth of the King's opposition, it passed a measure of economic reform which effected a saving of more than £72,000 a year.[5] It was a much less drastic measure than that which Burke had proposed in 1780; [6] and Rockingham would have liked to carry Burke's original measure. But that was found to be impossible in the face of the King's opposition, and of the support given to that opposition in the House of Lords by Thurlow and Shelburne.[7] In the second place

[1] Below 124.

[2] Fortescue, Correspondence of George III v 443, 452-455, 502-504; Lecky, op. cit. v 144; these authorities to some extent bear out Walpole's statement, Last Journals ii 543, that "Shelburne was busied in devoting himself to the King, and in traversing Lord Rockingham and Fox in every point"; for Shelburne's views on economic reform see below 117; vol. xi 504.

[3] 22 George III c. 45.

[4] Ibid c. 41.

[5] Ibid c. 82.

[6] Above 104; below 492-493, 521-522.

[7] Lecky, op. cit. v 144-145.

it made peace with the United States. The United States gained not only their independence, but much wider territories to the north and west than their French allies wished to concede to them.[1] In the third place, Ireland gained a large measure of independence. With the relations of Ireland to England I shall deal later.[2] Here it will be sufficient to say that the effect of Poynings' Act (1495) [3] was to put the Irish Parliament under the control of the King in council; that the effect of an Act passed in 1720 [4] was to make it clear that Ireland was also subject to the legislative control of the British Parliament; and, by another provision of the Act of 1720, that the court of final appeal for Ireland was the British and not the Irish House of Lords.[5] Thus, during the greater part of the eighteenth century, Ireland had been completely subordinated to England, and the large Roman Catholic majority had been completely subordinated to the Protestant minority. England used her power selfishly and foolishly; and, in the course of the century, a growing sense of nationalism naturally resented this selfish and foolish policy.[6] Many Irish emigrants fought in the American armies; and the Irish could not helping realizing that the Americans were fighting their battle.[7] They followed the example of the Americans, and asserted a claim to a larger measure of independence, which England was unable to resist.[8] In 1782 the Act of 1720 was repealed,[9] and in 1783 the Irish Parliament and the Irish courts gained their independence.[10] The link between the two countries was the King. He was represented in Ireland by his Lord Lieutenant who chose the Irish executive; and the Irish executive was responsible, not to the Irish Parliament, but to the ministry in England.[11] Of the difficulties created in the relations of the two countries, partly as the result of these changes, and partly as the result of the past and the subsequent history of these relations, I shall speak later.[12]

Rockingham, in spite of his defects, had the qualities of honesty, tact, and fairness. If he had lived he might have been able to keep his ministry together. Unfortunately he died a few months after his accession to office. That was the beginning of the end. The King sent for Shelburne, who had already quarrelled with Fox over the peace negotiations. Shelburne's political views were rather those of Chatham than those of the

[1] Camb. Col. Hist. i 776-778; Lecky, op. cit. v 193-194.
[2] Vol. xi 21-35.
[3] 10 Henry VII c. 4, amended by 3 and 4 Philip and Mary c. 4.
[4] 6 George I c. 5 § 1. [5] § 2; vol. i 371-372. [6] Vol. xi 29.
[7] Lecky, History of Ireland ii 153-155, 156-157, 160.
[8] Ibid 307-309; vol. xi 31-32. [9] 22 George III c. 53.
[10] 23 George III c. 28.
[11] Anson, Law of the Constitution (4th ed.) vol. ii part ii 9-12.
[12] Vol. xi 32-35.

Rockingham Whigs. They were divergent from the views of many of his colleagues, and he was personally disliked by many of them. Shelburne is an enigmatic character.[1] "Policemen tell us," says Bagehot,[2] "that there is such a character as a reputed thief, who has never been convicted of any particular act of thievery. Lord Shelburne was precisely that character in political life; everyone said he was dishonest, but no particular act of dishonesty has ever been brought home to him." It is clear that he was a man of ability and vision, a disciple of Chatham in his dislike of party and his attitude to America, and a friend of Franklin, Priestley, Price, Bentham,[3] and Adam Smith—he himself dated the beginning of his conversion to the principles of free trade to a journey which he had made from Edinburgh to London in 1761 in company with Adam Smith.[4] Yet he aroused feelings of intense hatred in many men of opposite parties; and even those who did not hate him agreed that he was an impossible colleague. Burke found him untrustworthy, suspicious, and whimsical;[5] Rockingham disliked him;[6] and the younger Pitt, who owed much to him, refused to give him office.[7] Probably the reason for this extreme unpopularity is to be found in two connected causes—personal and political. It was believed, and not without reason, that he could not be trusted to stand by his colleagues.[8] His utterances were often obscure; his temper was suspicious; and, in addition to these defects, he had an intellectual pride which led him to despise his colleagues, and a sarcastic tongue which made his contempt evident.[9] These personal causes for distrust were aggravated by his political views. His sympathy with the ideas of such reformers as Priestley, Price, and Bentham, and his dislike of the Whig party system,[10] put him wholly out of touch with the Rockingham

[1] Rosebery, Pitt 47-52; Trevelyan, Early History of Charles James Fox 141-142; Davis, Age of Grey and Peel 26-27.

[2] Biographical Studies 129-130.

[3] Davis, Age of Grey and Peel 54; below 117.

[4] Rae, Life of Adam Smith 153, citing a letter from Shelburne to Dugald Stewart written in 1795.

[5] "He had formerly, and several times, professed much friendship to me; but whenever I came to try the ground, let the matter have been never so trifling, I always found it to fail under me. With many eminent qualities he has some singularities in his character. He is suspicious and whimsical," Letter to Lord Kenmare cited by R. H. Murray, Burke 254.

[6] Horace Walpole, Letters (ed. Toynbee) xi 233; xii 208.

[7] Lecky, op. cit. v 132-136.

[8] Above n. 5.

[9] Lecky, op. cit. v 136-137.

[10] "He had quarrelled with the Whig aristocracy who did not do him justice; so he had a horror of the clan, and looked towards them with great bitterness of feelings," Bentham, Memoirs, Works x 187; Mr. Keir says, L.Q.R. l 375, that "the breadth of Shelburne's plans, which embraced fees and salaries in public offices, the civil establishment, customs, excise, treasury, woods and forests, and police, and his repeated return to the question of administrative reform in later years, seem to entitle him to high rank as a pioneer in the development of the modern administrative system;" below 501 n. 3.

Whigs, and with nearly all the politicians of the day, and produced that unanimity in hatred and mistrust, which, at first sight, seems so inexplicable.[1]

Such a man could not hope to form a stable ministry even though he was supported by the King. He was driven to resign by the famous Fox-North coalition. That coalition was the most ill-advised of Fox's many ill-advised acts. It illustrates his incurable tendency to think only of the momentary interests of his party, and his blindness both to the broader issues and to the changing conditions of politics. Both he and North inherited the old bad tradition of the Whig clans.[2] That tradition sanctioned the creation and dissolution of ephemeral alliances with a view to an immediate triumph over their opponents; and so Fox and North, who had been brought up in this political atmosphere, and who were both eminently placable men,[3] saw no harm in their coalition. They made the mistake of not seeing that, though such a course might be possible in the old days when no differences of principle divided the different sections of the Whig party, it was not possible when parties were separated by fundamental differences of principle;[4] and of not seeing that such a coalition would shock the feelings, not only of the electors, but of that unrepresented public opinion, which was beginning to demand both adequate representation and other reforms.[5]

The King was furious.[6] He was obliged to yield for the

[1] In 1782 the King wrote to Shelburne, "Mr. Fox . . . avowed that Administration would not be supported unless the first Ld. of the Treasury was one who agreed entirely in principles and lived in habitude with the friends of Ld. Rockingham in which predicament he could not reckon Ld. Shelburne," Fortescue, Correspondence of George III vi 73; above 109 n. 5.

[2] Above 62.

[3] "Never perhaps did two men exist, more inclined by nature to oblivion of injuries, and to sentiments of forgiveness than Lord North and Fox! The latter whatever might be his defects of character, possessed in an eminent degree, placability and magnanimity of mind. '*Amicitiae sempiternae, Inimicitiae placabiles*,' was a Maxim always in his mouth," Wraxall, Historical Memoirs ii 275.

[4] As early as 1764 Horace Walpole had said that George III's policy had revived the quarrels of Whig and Tory, and "though a struggle for places may be now, as has often been, the secret purpose of principals, the court and the nation are engaging on much deeper springs of action," Letters (ed. Toynbee) vi 98.

[5] I am rather inclined to think that Professor Laprade in his Introduction to the Parliamentary Papers of John Robinson (R.H.S.) unduly minimizes this aspect of the case—though undoubtedly it is true that the support of the King, and the support of the merchants, who disliked the India Bill, were the most important causes of Pitt's victory; Grafton, in his Autobiography 367, says, "it would be difficult to describe the resentment shown by the independent part of the nation on the expectation of a junction, which brought discredit on the leaders"; Grafton shared this view, and dissuaded Shelburne from entertaining the idea of such a coalition, ibid 353; cp. Wraxall, Historical Memoirs ii 408; Horace Walpole, Letters (ed. Toynbee) xii 419.

[6] Wraxall, Memoirs ii 375-376, says that, though the King had kept his courage and serenity through all the troubles of his reign, he now became "a prey to habitual

moment; but he was determined to compass the downfall of the coalition. Fox's India Bill gave him his chance. America had destroyed the King's personal government conducted with the help of Lord North and the King's friends: India was now to destroy the coalition government which had, for the moment, overthrown the King's power—a striking illustration of the way in which the problems arising from the expansion of England were dominating politics.

The problem of India, like the problem of America, had become more complex as the result of the victories of the seven years' war. We shall see that the empire, which the East India Company had acquired, had occupied the constant attention of Parliament.[1] The Crown had assumed control in 1773,[2] but some power was still left to the Company. The system of government established in 1773 had not worked well; the governor-general and his council, and the council and the supreme court, were quarrelling; and all sorts of abuses in the government were rampant.[3] It had become clear that the Crown must exercise an increased control. Fox's bill attempted to accomplish this object by vesting for four years the supreme power in India in a body of commissioners to be appointed by the Legislature, and removable only on an address by either House of Parliament.[4] The bill was attacked both on the ground that it was a violation of the Company's charter, and on the ground that its aim was to perpetuate the reign of the coalition by giving to it the whole of the patronage of India.[5] Both these grounds of attack were fallacious; but they made excellent party capital.[6]

The King saw his chance. It was clear that the bill would pass the House of Commons; but, if it was rejected by the Lords, its rejection would be an excuse to get rid of his ministers. To effect this object he sent for Earl Temple, who was not a member of the government, and asked him for his advice. As the result of the advice given to him by Temple and Thurlow, it was resolved to use the royal influence in the House of Lords to destroy the bill. Temple was given a card containing the following words:

His Majesty allowed Earl Temple to say that whoever voted for the India Bill was not only not his friend, but would be considered by him

dejection"; see Fortescue, Correspondence of George III vi 321-327, for a memorandum by the King detailing his attempts to avoid giving office to the coalition; Lecky, op. cit. v 219-220.

[1] Vol. xi 159-168.
[2] 13 George III c. 63.
[3] Lecky, op. cit. v 227-229.
[4] Vol. xi 203-204.
[5] As early as 1769 Horace Walpole had said, Letters (ed. Toynbee) vii 299, that "the Company have more and greater places to give away than the First Lord of the Treasury."
[6] Lecky, op. cit. v 233-238.

as an enemy; and if these words were not strong enough Earl Temple might use whatever words he might deem stronger and more to the purpose.

The bill was consequently rejected, the King dismissed his ministers, and asked Pitt to form a ministry—though he was in a hopeless minority in the House of Commons. Pitt carried on till he deemed it expedient to dissolve Parliament. His triumphant majority in the new Parliament, secured largely as a result of the national condemnation of the coalition, begins his long lease of power, and a new period in English history. It is a new period in English history for two reasons. In the first place, though Pitt's triumph was a victory for the King, it was also the final defeat of his system of personal government. He could not get rid of Pitt, who was the only alternative to the hated coalition; and Pitt was far too great and too able a statesman to be, like North, merely the obedient servant of the King. In the second place, though down to 1832 both the King and the House of Lords could make their influence felt, Pitt's ministry marks the beginning of the period during which the House of Commons increased its power at the expense of the House of Lords and the King. In other words, it marks the beginning of the disappearance of that balanced eighteenth-century constitution of separated powers which the old Whig party had created.[1]

The main difference between the new Tory party, which had risen to power in George III's reign, and the old Whig party, was a difference as to the position which the Crown ought to take in the constitution. The Tory party and George III believed that a personal prerogative wielded by the King ought to take a large part in shaping the policy of the state. The Whigs believed that the royal prerogative should be much more closely controlled by Parliament, and by ministers who were supported by Parliament. Naturally this difference between the two parties led them to take different views on certain matters. The Tories opposed, and the Whigs favoured, a policy of economic reform which tended to diminish the power of the Crown; and the Tories opposed, and the Whigs favoured, a large liberty of discussion. But, apart from the main difference and these consequential differences, there was a very large amount of agreement between the Tories and the main body of the Whigs as to the undesirability of changing the fundamental principles of the constitution, and as to the desirability of correcting obvious abuses.[2]

[1] Above 55.

[2] "Down to the revolutionary period, the nation as a whole was contented with its institutions. The political machinery provided a sufficient channel for the really efficient power of public opinion," Leslie Stephen, The English Utilitarians i 16.

Burke, in a speech on Parliamentary reform which he made in 1782, distinguished between "a declaration of defects, real or supposed, in the fundamental constitution of the country," and "a moral or political exposure of a public evil, relative to the administration of government"; [1] and that was a distinction with which Blackstone agreed.[2] Both Burke and Blackstone were opposed to fundamental changes. Both were ready to remedy administrative defects which did not touch these fundamentals. And so we find that, amid the conflict of parties, which raged during the first twenty-three troubled years of George III's reign, new ideas were gaining ground and old abuses were being remedied. Let us look at one or two illustrations.

As the eighteenth century advanced there was a growing feeling in favour of religious toleration. Lord Mansfield in 1767 condemned the practice, followed by the City of London, of electing to offices dissenters, who could not serve because they could not comply with the Test Act, and then fining them for refusing to serve.[3] Though in 1772, 1773, and 1774 Parliament refused to relieve clergymen and students at the universities from the obligation of subscribing to the thirty-nine articles,[4] in 1779 dissenting ministers and teachers were relieved from the necessity, placed upon them by the Toleration Act of 1688,[5] of assenting to certain of the articles of the Church of England.[6] In 1774, in spite of the opposition of the Whigs, Lord North carried the Quebec Act, which legalized and practically established the Roman Catholic religion in what had formerly been

[1] "There is a difference between a moral or political exposure of a public evil, relative to the administration of government, whether in men or systems, and a declaration of defects, real or supposed, in the fundamental constitution of your country. The first may be cured in the individual by the motives of religion, virtue, honour, fear, shame, or interest. . . . It is quite otherwise with the frame and constitution of the state; if that is disgraced, patriotism is destroyed in its very source," Works (Bohn's ed.) vi 152; as Lecky very truly says, op. cit. iii 415, "with Burke an extreme dread of organic change co-existed with a great disposition to administrative reform."

[2] Vol. xii 728-729; but Blackstone was not opposed to a measure for the reform of Parliament, vol. xii 729.

[3] Lecky, op. cit. iv 291-292; see Lord Mansfield's speech, Parlt. Hist. xvi 316-327; he pointed out at pp. 318-319 that before the Toleration Act a dissenter could not have pleaded his disability, because the law required all persons to take the sacrament according to the rites of the Church of England, and therefore to allow him to plead his disability would have meant allowing him to set up his own disobedience to the law as a defence; the Toleration Act had altered this, because it was no longer a crime for a man to be a dissenter and not to take the sacrament —"nay the crime is if he does it contrary to the dictates of his conscience."

[4] Lecky, op. cit. iv 292-297; Burke opposed these bills, Works vi 91-102, on the ground that if men wished to be clergymen of the Church of England they must subscribe to its formularies; but in 1773 he spoke and voted for proposals (carried in the House of Commons but rejected by the House of Lords) similar to those ultimately embodied in the Act of 1779, ibid 102-113; Lecky, op. cit. iv 298.

[5] 1 William and Mary c. 18. [6] 19 George III c. 44.

French Canada.[1] In England the worst of the penal laws against the Roman Catholics had been allowed to fall into desuetude, and their enforcement was discouraged by the judges. But it was always possible to revive them from motives of avarice and revenge.[2] This was an obvious abuse; and in 1778 a relief bill was carried without a division in both Houses,[3] which was the occasion of the Gordon riots.[4] Another illustration of the willingness of both Whigs and Tories to reform obvious abuses is the passing of the Grenville Act in 1770,[5] which provided for a more impartial tribunal for the trial of election petitions—an Act which was so successful that it was made perpetual in 1774.[6] In the same year another Act was passed which got rid of the abuse arising from the fact that no civil action could be brought against a member of Parliament or his servants during a session of Parliament, and for forty days before and after the session.[7] Similarly both parties were fully conscious of the abuses in the East India Company's government of India. In 1772 a select committee was appointed to enquire into the affairs of the Company; and we have seen that in 1773 an Act was passed which transferred a large part of its political powers to the Crown.[8] We have seen that in 1772 the barbarous penalty for "standing mute" was abolished.[9]

The exigencies of party politics compelled the Whigs to oppose some of these measures. Lord North's Quebec Act,[10] and his Act which gave the Crown the control of the government of India, are examples.[11] But neither party was really opposed to administrative reforms of this kind; and neither party desired fundamental changes. To such changes the Rockingham Whigs were as opposed as the Tories. To any measure of Parliamentary reform, to any measure for shortening the duration of Parliament, to any measure which would disable the heads of the great departments of state from sitting in Parliament, to the idea that members of Parliament were mere delegates to carry out the mandates of their constituents, the Rockingham

[1] 14 George III c. 83.
[2] Lecky, op. cit. iv 303-306.
[3] 18 George III c. 60.
[4] Lecky, op. cit. iv 309-325.
[5] 10 George III c. 16; below 548-549.
[6] 14 George III c. 15. Walpole, Last Journals i 301, says that it "proved the most effectual bar to corruption that had ever been devised, and was a tacit confession of the iniquity of decisions in Committees of the whole House, for the whole parties and majorities would brave any general shame."
[7] 10 George III c. 50; it was strongly supported by Mansfield, Parlt. Hist. xvi 974-978; he said, "I am sure, were the noble lords as well acquainted as I am with but half the difficulties and delays that are every day occasioned in the courts of justice, under pretence of privilege, they would not, nay they could not, oppose this Bill," at p. 975.
[8] 13 George III c. 63; above 111.
[9] Vol. i 327; 12 George III c. 20.
[10] Lecky, op. cit. iv 299-300.
[11] Ibid 278-280.

Whigs were as opposed as the Tories. The view of both these parties was very clearly stated by Burke in 1780. He said: [1]

> I have been for fifteen years a very laborious member of Parliament; and in that time have had great opportunities of seeing with my own eyes the working of the machine of our government, and remarking where it went smoothly and did its business, and where it checked in its movements, or where it damaged its work. I have also had and used the opportunities of conversing with men of the greatest wisdom and fullest experience in those matters; and I do declare to you . . . that, on the result of all this reading, thinking, experience, and communication, I am not able to come to an immediate resolution in favour of a change in the groundwork of our constitution; and, in particular, that in the present state of the country, in the present state of our representation, in the present state of our rights and modes of electing, in the present state of the several prevalent interests, and in the present state of the affairs and manners of this country, the addition of a hundred knights of the shire, and hurrying election on election, will be things advantageous to liberty or good government.

And, as usual, Burke supplied both these parties with a good reason for their belief. In a speech on Parliamentary reform, which he made in 1782, he contended that the existing system did provide a moral and a political equality of representation as between persons and classes, because it returned members of Parliament "equally interested in the prosperity of the whole," and of men who, because they had no local interests, were better able "to preserve the balance of the parts." [2] This view has won the support of many later thinkers—of Mackintosh, of Lord John Russell, of Bagehot,[3] and of Leslie Stephen.[4]

When the American question, the Irish question, and the question of economic reform, had been settled, there were but few outstanding differences between the Rockingham Whigs and the Tories. But we have seen that, at all periods in the eighteenth century, public opinion outside Parliament could make itself heard; [5] and even Burke admitted that there were occasions when the only way of preserving the constitution was by "the interposition of the body of the people itself." [6] But that

[1] Works (Bohn's ed.) vi 2-3.

[2] Ibid 149-150. He ridiculed the advocates for Parliamentary reform, by comparing them to "the unhappy persons who live, if they can be said to live, in the statical chair; who are ever feeling their pulse, and who do not judge of health by the aptitude of the body to perform its functions, but by their ideas of what ought to be the true balance between the several secretions"; Walpole, Last Journals ii 380-381 agreed with Burke.

[3] Bagehot, Essays on Parliamentary Reform 63-65.

[4] The English Utilitarians i 16-18.

[5] Above 94, 110.

[6] "In the situation in which we stand . . . I see no other way for the preservation of a decent attention to public interest in the representatives, but *the interposition of the body of the people* itself, whenever it shall appear, by some flagrant and notorious act, by some capital innovation that these representatives are going to overleap the fences of the law, and to introduce an arbitrary power. This interposition is a most unpleasant remedy. But, if it be a legal remedy, it is

interposition sometimes gave rise to suggestions for reform which were as distasteful to the Rockingham Whigs as to the Tories.[1] We have seen that the King's personal government, carried on through the agency of Lord North, had given rise to a sustained agitation, to county committees, to projects for shorter Parliaments, for the reform of Parliament, for economic reform, and to the idea that members of Parliament should act as the delegates or agents of their constituents.[2] We have seen that Chatham and other members of the Whig party had given their support to some of these ideas.[3] In this incipient schism in the Whig party we can see the germs of that division between the new and the old Whigs, which differences of opinion on the French Revolution later brought to a head.[4] Opposition to the King's personal government, and to the corruption which enabled the King to make his will prevail, was the immediate occasion for this division of opinion. But, in fact, it went deeper. Times were changing, and, in the latter half of the century, the age was ceasing to be so static as it had been in the earlier half. New political, social, and economic needs and ideas were demanding reforms more drastic than the small administrative changes which the Rockingham Whigs and the Tories approved.

These new needs and ideas were giving rise to a school of more radical reformers. The origins of the ideas of some of these reformers can be traced to the Protestant dissenters, and, through them, to the Puritans of the Commonwealth;[5] and, from this point of view, they are affiliated to some of the ideas which inspired the Americans to assert their independence,[6] and the Irish to emancipate themselves from the control of the English Parliament.[7] In fact, the Protestant dissenters, because they were not full members of the state, had always been inclined to look more critically at the English constitution than either of the two great parties in the state.[8] They looked more critically at the working of the constitution and at the results of that working; and they were inclined to adopt the pessimistic view of Browne's "Estimate"[9] rather than the optimistic view of Blackstone's "Commentaries."[10] They were more receptive to the new ideas which such books as Rousseau's "Contrat Social," and Hume's "Political Essays" were disseminating. Priestley

intended on some occasion to be used; to be used then only, when it is evident that nothing else can hold the constitution to its true principles," Present Discontents, Works i 369.

[1] Above 109-110. [2] Above 102.
[3] Above 102. [4] Below 124.
[5] H. W. C. Davis, The Age of Grey and Peel 49. "The liberal dissenters were the backbone of the reforming party in England," Leslie Stephen, English Thought in the XVIIIth Century ii 252.
[6] Vol. xi 57, 129-130. [7] Ibid 31-32. [8] H. W. C. Davis, op. cit. 56.
[9] Above 82. [10] Vol. xii 729-730.

favoured a right of revolution, the extent of which "would shock any Whig of conservative tendencies";[1] and it was from him that Bentham derived his principle that all laws should be tested by their capacity of providing for the greatest happiness of the greatest number.[2] Price advocated Parliamentary reform, shorter Parliaments, and the duty of members of Parliament to obey the mandates of their constituents;[3] he defended the Americans in his "Observations on Civil Liberty";[4] and it was he who was the author of the fallacious idea that the national debt could be paid off automatically by means of a sinking fund accumulating at compound interest—an idea which, unhappily for the state, Pitt adopted.[5] Adam Smith submitted the tangle of the laws which regulated trade to a critical analysis. He showed that all commercial regulations of this kind hindered the increase of wealth; and he reduced to a system a body of economic principles which proved the advantage of greater freedom of trade. He gave a scientific form to ideas which had begun to ferment in many minds.[6] Bentham was prepared to submit the whole public and private law of England to the test of utility—to analyse it critically from this point of view,[7] just as Hobbes had analysed it critically from the point of view of his theory of sovereignty more than a century before.[8] Shelburne's house was the meeting-place of many of these radical thinkers. Priestley was his librarian; Price, at his suggestion, gave up theological for political work; Franklin and Romilly were his friends; Bentham was a favoured guest;[9] and there Pitt learnt the new economic doctrines taught by Adam Smith.[10] It is perhaps not

[1] H. W. C. Davis, op. cit. 53.

[2] "In the tail of one of his pamphlets I had seen that admirable phrase 'greatest happiness of greatest number' which had such an influence on the succeeding part . . . of my life," Bentham, Works x 46; see ibid 79; but elsewhere, ibid 142, Bentham says that he may have got the principle from Beccaria.

[3] H. W. C. Davis, op. cit. 55.

[4] Lecky, op. cit. iv 334. Walpole says that it "was the first publication on that side that made any impression . . . the author was complimented with the freedom of the City," Last Journals ii 22-23; the sting of Price's defence of the Americans lay in "the alarm it gave to the proprietors of the funds by laying open the danger to which they were exposed by the ruinous measures of the Court," Walpole, Last Journals ii 22.

[5] Below 121-122.

[6] "The idea of free trade spread first among isolated reformers, then amongst the most enlightened part of the public, then among an ever-increasing section of the population, whose immediate interests were suffering from a prolonged war. Their liberal ideas implied a principle; they needed a doctrine and a thinker to arrange them in a system. At the propitious moment Adam Smith gave them a definite and classical form. . . . Contemporaneous with the Declaration of American Independence, the book was hardly a few years in advance of the average opinions of any supporter of the reforms which were both necessary and possible in the England of the eighteenth century," Halévy, Growth of Philosophic Radicalism 106-107.

[7] Vol. xii 733.

[8] Vol. v 480-482; vol. vi 297.

[9] H. W. C. Davis, op. cit. 54; Halévy, Growth of Philosophic Radicalism 146.

[10] Ibid 165.

surprising that a statesman who had these associates and sympathized with their ideas, and who, at the same time, disbelieved in party and was prepared to act as a "King's friend," should have been hated and suspected by the more orthodox members of both political parties.[1]

It is clear, therefore, that a schism was growing up in the Whig party—it was developing a left wing. But the accession of Pitt to power seemed likely, for a time at any rate, to do much to prevent the continuance of the schism. He had the support of the King, and of the great majority of the nation; and he was inclined to agree with many of the ideas of the left wing of the Whig party.

Pitt, as Lord Rosebery has said, "is one of the rare instances, like John Mill and Macaulay, of infant prodigy maturing into brilliant manhood."[2] All his great talents had been directed by his father to developing his natural powers of oratory and statesmanship—to such effect, that, when he made his first speech in the House of Commons in 1781, he was at once recognized as one of the best speakers in the House.[3] He refused office in the Rockingham administration; but he showed that he shared the opinion of his father on the necessity for restricting the corrupt influence of the Crown, by moving, in 1782, for an enquiry into the best means of reforming the representation of the people. The motion was only lost by twenty votes, and the cause of Parliamentary reform never came so near success till 1831.[4] In Shelburne's ministry he had been Chancellor of the Exchequer, and its main support in the House of Commons. When the coalition compelled Shelburne to resign, great efforts were made to induce Pitt to become his successor. Though he was then only twenty, he showed a greater political judgment than the most experienced politicians of the day, by refusing; and, when he took office on the defeat of Fox's India Bill, he showed equal political judgment by the manner in which he delayed a dissolution of Parliament till the national feeling against the coalition had gathered force. In 1784, at the age of twenty-five, Pitt became prime minister and the real ruler of England; and, with only a brief interlude (1801-1804), he retained that position till his death in 1806.

From his earliest years he had studied the arts of oratory and debate; and he so improved his natural gifts of voice, dignity, and memory that he became, with the exception of Fox, the best speaker and debater in the House. He could be lucid, and he

[1] Above 109-110. [2] Life of Pitt 3.

[3] Ibid 15. Lord Rosebery points out that "his first speech was, what, perhaps, no other first speech ever was, an effective reply in debate"; cp. Horace Walpole, Letters (ed. Toynbee) xii 5-6.

[4] Lecky, op. cit. v 148-149.

could, when necessary, hide his meaning in well-chosen phrases. He was a master of declamation, invective, and sarcasm.[1] To great political judgment he added a perfect self-possession, and a sagacity in divining the trend of public opinion in and out of the House. His speeches delighted the House. His dignified aloofness, his indifference to honours and pecuniary rewards, and his personal purity awed it. And so he was popular in the House, "with the popularity which a great general always enjoys among his soldiers when they have an unbounded confidence in his skill."[2] But his speeches were made for the occasion. They have none of the learning and philosophy of Burke, nor any of those flashes of eloquence and epigram which illumine many of his father's speeches.[3] He had neither the genius of his father, nor his insight into the problems of world politics. But he had more than his father's abilities as a purely Parliamentary statesman;[4] and he was what his father never was, a great financier and administrator, careful of all the details of his measures, and sparing no labour to perfect them.[5] Like his father he had the qualities of courage and hopefulness—qualities which never deserted him till the dark days of Ulm and Austerlitz. Though proud and aloof to the world, he had another side—social, witty, and affectionate, which he showed only to his intimate friends.[6]

Pitt approximates more closely to a modern prime minister than any of his predecessors. He would suffer no opposition in his cabinet, as Thurlow found in 1792 when he attacked one of Pitt's measures.[7] But even he did not hold the same position as that which a modern prime minister holds. In the first place, Pitt, like Walpole, owed his power to the fact that he could command the King's support.[8] When the King went mad in 1788, it was assumed that the regency of the Prince of Wales would mean his downfall; and that was why the opposition was so eager to assert, and the government to deny, the Prince's indefeasible right to become regent without limitations.[9] The King's opposition to his scheme of religious equality, which was an essential part of his scheme for the union between Great Britain and Ireland, was fatal to the success of that union.[10] In the second place, Pitt could not on all occasions command a docile majority. At the very outset of his administration he failed, as he deserved to fail, to exclude Fox from the representa-

[1] Lecky, op. cit. v 266-267. [2] Ibid 276. [3] Ibid 267-271.
[4] Ibid 272; as Macaulay says in his essay on Pitt, he was "the man of Parliamentary government . . . the child, the spoiled child, of the House of Commons."
[5] Bagehot, Biographical Studies 142-145, 148-149, 152.
[6] Lecky, op. cit. v 280-281. [7] Ibid 288-289.
[8] Above 61. [9] Below 440, 442; Lecky, op. cit. v 38.
[10] Rosebery, Pitt 197-200.

tion of Westminster by the undue prolongation of a scrutiny.[1] He failed to carry a very moderate measure of Parliamentary reform in 1785 [2]—a failure which was long regretted by the few thoughtful men who could realize the need for adapting gradually the representative system to the new conditions of the day.[3] He failed to carry a liberal commercial treaty with Ireland, which would have gone far to heal the discord between the two countries.[4]

In spite of his great majority in the House of Commons, and in spite of the support of the Crown, Pitt had not the free hand which a modern prime minister has, so long as he keeps his majority in the House of Commons. It would have been better for England if he had had this power. But it was fortunate for England that, down to the outbreak of the war with France, she was governed by a statesman who, because he never abandoned his liberal sympathies, accomplished much during the nine years of peace which followed his attainment of power.

His greatest achievement was in the sphere of finance. First, in the machinery for the collection and audit of the revenue, secondly, in the character of the taxes imposed, and, thirdly, in the principles of fiscal policy, he substituted order for chaos; fourthly, what was in the opinion of his contemporaries his greatest achievement, he set on foot an elaborate scheme for the gradual redemption of the national debt.

(i) The machinery for auditing the public accounts was ridiculous. Nominally it was entrusted to two persons called the auditors of imprest, who were highly paid and did nothing. In 1784 these auditors were abolished, and a board of five commissioners were appointed to audit the accounts of all departments. At the same time another body of commissioners was appointed to examine into the fees and emoluments received in public offices, and into the abuses connected with them.[5] When Pitt became minister there were 196 sinecure offices connected with the Customs which cost the country £42,000 a year. Pitt abstained from filling these offices, and in 1798 abolished them altogether.[6] (ii) The multiplicity of the duties imposed at different times by different statutes on different articles, had created a system which was both intricate and confused. It was

[1] Lecky, op. cit. v 331-335; Horace Walpole, Letters (ed. Toynbee) xiii 255.

[2] Lecky, op. cit. v 336-339; H. W. C. Davis, The Age of Grey and Peel 69.

[3] "The time suited the attempt; and the minds of men were more prepared to receive a temperate reform than I am afraid they have ever been since. Every man can see the corruptions, though they endeavour to blind themselves on the consequences of the sooner or later ruin, which they unavoidably will produce. . . . I cannot but be surprised to find so few persons who are in a constitutional light aware of their danger," Autobiography of the Duke of Grafton 398.

[4] Lecky, op. cit. v 305-307.

[5] Ibid 297, 300-301.

[6] Ibid 298.

said that a pound of nutmeg paid or ought to have paid nine different duties.

> Pitt abolished the existing multifarious duties and drawbacks, and substituted for them a single duty on each article, amounting as nearly as possible to the aggregate of the duties it had previously paid; and all duties and other taxes, instead of being divided into a number of distinct funds, were now brought into one general fund, called the Consolidated Fund, out of which all the different classes of public creditors were to be paid. . . . The magnitude and complexity of the task is sufficiently shown by the fact that nearly 3000 resolutions were necessary to carry it into effect.[1]

(iii) With the exception of Shelburne, Pitt was the only statesman who believed in the efficacy of the greater freedom of trade between nations, which was advocated by Adam Smith.[2] In the first place, he saw that excessive duties encouraged smuggling, and that, consequently, the product of the duties was diminished. Therefore, in addition to measures taken to prevent smuggling,[3] he reduced and equalized many duties.[4] In the second place, he tried to carry out the policy of giving greater freedom to trade by means of commercial treaties. His projected treaty with Ireland was foiled by the commercial jealousy of the English manufacturers.[5] But he negotiated a commercial treaty with France in 1786, which allowed freedom of commerce in all articles not specially excepted, reduced the duties on many articles, provided that other goods should only pay the duties payable by the most favoured nation, and guaranteed the freedom of religious worship, personal freedom, and protection for property, of the subjects of each country while resident in the country of the other.[6] (iv) In 1786 the result of Pitt's financial measures was a surplus of over £900,000. He proposed to raise this surplus to one million, and to apply it annually to the redemption of the national debt.[7] The manner in which this fund was to be applied to this purpose was suggested by Price. The fund was to be applied to the purchase of stock, and the interest on the fund was to be applied in the same way. In this way it was thought that a fund would be formed, which would automatically increase at compound interest at a constantly accelerating rate, and would thus wipe out automatically the national debt.[8] The fallacy of the scheme consisted in this: it ignored the fact first, that a debt can only be paid out of a surplus, and, secondly, that the compound interest, with which the debt was to be wiped out, could only be provided by increased taxation

[1] 27 George III c. 13; Lecky, op. cit. v 304-305.
[2] Ibid 305.
[3] 24 George III Sess. 2 c. 47; 26 George III c. 40; 42 George III c. 82.
[4] Lecky, op. cit. v 299.
[5] Above 120.
[6] Lecky, op. cit. v 307-318.
[7] Ibid 319-320.
[8] Ibid 322-325.

or by further borrowing. But no one then saw through the fallacy. Pitt, as Bagehot has said, "framed a puzzle in compound interest, which deceived himself, and everyone who was entrusted with the national finances, for very many years." [1] His sinking fund continued to operate all through the French war. "The nation annually borrowed vast sums at high interest, and applied part of them to pay off a debt which bore a low interest, and the absolutely useless and unrequited loss resulting from this process in the course of the war can have been little less than £20,000,000." [2]

No doubt Pitt's sinking fund scheme was a costly mistake. No doubt the finance of Pitt during the war is open to serious criticism. No doubt the prosperity of the country was due, as he admitted,[3] not so much to his finance, as to the industrial revolution, which was making England a manufacturing country. But something was also due to his sound financial and commercial policy, which made the finances of England "the admiration of the world." [4] In Bagehot's opinion, and Bagehot was an expert in these matters, he was "one of the greatest financiers in our history." [5]

The defeat of Fox's India Bill had been the occasion of Pitt's rise to power. Pitt's bill put the Company's government of India under the power of a board of control appointed by the King, and consisting of a Secretary of State, the Chancellor of the Exchequer, and four privy councillors. The Company retained the greater part of its patronage; but the Governor-General, the Presidents of Provinces, and all the members of their Councils, must be approved by the King; and he could dismiss them. A tribunal was also set up to deal with abuses committed by officials in India.[6] Pitt's legislation as to India showed that all parties in the state were determined to redress the abuses which had sprung up under English rule, and to assert the principle that that rule over India was in the nature of a trust which entailed obligations to the ruled. The impeachment of Warren Hastings, whatever we may think of its justice,[7] had the beneficial result of burning that principle into the national conscience. The other important colonial measure carried by Pitt was the Quebec Government Act of 1791 which gave representative government to Canada.[8] If he had been able to carry his scheme of giving equal rights to Catholics and Protestants in Ireland, of substituting a rent charge for tithe, and of endowing the Catholic church; and of combining these

[1] Biographical Studies 144. [2] Lecky, op. cit. v 326.
[3] Parlt. Hist. xxix 816-838, cited Lecky, op. cit. vi 64-65.
[4] Ibid v 330. [5] Biographical Studies 145.
[6] 24 George III Sess. 2 c. 25; Lecky, op. cit. v 351-353; vol. xi 209.
[7] Vol. xi 202-203. [8] 31 George III c. 31; Lecky, op. cit. vi 52-58.

reforms with the Union of Great Britain and Ireland; he would have gone far towards solving the Irish problem.[1]

At home Pitt carried some useful measures of reform, and advocated others which he failed to carry. The freedom of the Press was finally secured in its modern form by the passage of Fox's Libel Act in 1792.[2] He carried a measure of relief to Roman Catholics in 1791;[3] but he was opposed to throwing public offices open to Protestant dissenters by a repeal of the Test and Corporation Acts.[4] The public conscience was being aroused by the iniquities of the slave trade, and Pitt co-operated with Wilberforce in passing an Act in 1788 to mitigate the horrors of the Middle Passage;[5] and in 1792, in what was perhaps the greatest of all his displays of eloquence, he unsuccessfully advocated the abolition of that trade.[6] We have seen that he failed to carry a moderate measure of Parliamentary reform in 1785.[7]

It might perhaps have been expected that Pitt would have done more during these years to carry reforms which were becoming more and more necessary to meet new intellectual, social, and economic ideas. And it may be that his love of power, and his extraordinary gifts as a Parliamentary tactician and debater, led him to lose sight of the importance of settling some of these questions, and to acquiesce too easily in a policy of shelving them to a more convenient season.[8] The qualities needed by a Parliamentary tactician and debater are qualities which enable a man to meet a present difficulty, and to triumph over a present opponent. Absorption in the acquisition and exercise of these qualities tends to disable a man from taking long views, and to destroy his sense of proportion and reality. These qualities were not destroyed in Pitt. He effected some reforms and tried to effect more. But we can see some of the consequences of Pitt's position as leader of the House of Commons in the face of an able opposition, both in the way in which he acquiesced in the shelving of pressing measures of domestic reform, and in his disastrous misunderstanding of the French Revolution and of the character of the war with revolutionary France.[9]

[1] Bagehot, Biographical Studies 146-147.

[2] 32 George III c. 60; below 689-690. [3] 31 George III c. 32.

[4] Lecky, op. cit. vi 6-7; but, as Lecky points out, but for the French Revolution and the confiscation of church property which accompanied it, the Acts would probably have been repealed in a short time—in 1789 the motion for repeal was only lost by twenty votes.

[5] 28 George III c. 54.

[6] Lecky, op. cit. vii 377; as early as 1750 Horace Walpole had denounced the iniquities of the slave trade, Letters (ed. Toynbee) ii 433.

[7] Above 120. [8] See Lecky, op. cit. v 330-331, 341-342.

[9] "'It will be a very short war,' he is reported to have said, 'and certainly finished in one or two campaigns.' 'No, Sir,' Burke answered . . . 'it will be

But in fairness to Pitt two things must be remembered. In the first place, though he could generally command the confidence and the influence of the King, he could not always do so; and he could not command the assent of all the members of his party. Moreover, the measure of economic reform which Fox and Burke had carried, had made it more difficult to secure the assent of the members of his party by influence of the accustomed kind. The large number of peerages which were granted during his administration is due to the loss of many other means of reward.[1] But it is clear that, as a means of getting and keeping Parliamentary support, the grant of a peerage, which removes a man from the House of Commons, is a much inferior mode of influence to the grant of an office which does not. In the second place, after 1790, the shadow of the French Revolution coloured all men's minds. Burke and Fox finally separated after the debates on the Quebec Government Act;[2] and many other persons of liberal sympathies thought that all projects of reforms might well be laid aside at a time when all the energies of the nation were needed to prevent Revolutionary ideas from destroying the constitution. Pitt who was at the centre of affairs, who was fully informed of all the symptoms of disaffection in the country, who knew all about the activities of those who sympathized with the French, who could see from the example of France what a resolute minority not suppressed in time can do, cannot be blamed for taking this view. It is of course easy to say that there was no danger of a revolution in England—that is always said when the repressive measures taken to avert revolution have succeeded in averting it. But there were clear danger signs; and, in the face of what was happening in France, no reasonably prudent statesman could afford to take risks.

If there had been no French Revolution, if Pitt's peace policy could have been maintained, he would not have abandoned his early liberal sympathies—as late as 1796 he tried to carry a large measure of poor law reform.[3] If he had not abandoned them,

a long war and a dangerous war, but it must be undertaken.' That a bankrupt and disorganised Power like France could be a serious enemy, seemed to Pitt wholly incredible," Lecky, op. cit. vii 171.

[1] "In Burke's eagerness to diminish the supposed overgrown influence of the Crown, arising from the distribution of offices among the members of the House of Commons, a greater injury has been probably sustained by the British Constitution. The minister, deprived of the means of procuring Parliamentary attendance and support, by conferring places on his adherents, has in many instances been compelled to substitute a far higher remuneration; namely Peerages," Wraxall, Memoirs ii 177-178; and Wraxall tells us that Burke admitted the truth of this criticism.

[2] Lecky, op. cit. vi 53-54, 439-445.

[3] Rosebery, Pitt 168-171; for Bentham's criticism of this bill see Works viii 440-461.

and if he had shown himself determined to pass them, if he had been able to deal sympathetically with the problems raised by the industrial revolution, he might have bridged the gap between the eighteenth century and our modern world, as skilfully as the Tudors had bridged the gap between the Middle Ages and the new world of the Renaissance and the Reformation. But this was not to be. The twenty years' war with France began in 1793. Its outbreak is the end of eighteenth-century England and Europe.

The eighteenth century was not a century, like the sixteenth and seventeenth centuries, in which there had been great changes in religious and political theory, and in the structure of the state. The Revolution settlement, and its theory as expounded by Locke, satisfied most Englishmen for the greater part of the century. But that settlement, because it divided the powers of the state between the King, the House of Lords, the House of Commons, and the Courts, ensured conflicts between some of these partners for the position of managing partner, which led to many developments in the working of the constitution. It led also to intellectual developments in the spheres of religion, political philosophy, and economics, which were encouraged by the interchange of ideas between England and the continent; and these developments inspired changes in the law on many topics, and proposals for still more radical changes. At the same time changes in external conditions were enforcing the need for reforms in many different directions. The wars and diplomacy of the century, which had led to the expansion of England overseas, the constitutional and economic problems which that expansion involved, the successful revolt of the American colonies which resulted from the failure to solve these problems, and the grant of independence to the Irish Parliament which followed that revolt, were making it apparent, at the end of the century, that reforms were needed to fit the institutions and public law of Great Britain to its new position of a world power. In the second half of the century scientific discoveries, and their application to industry, were making Great Britain the leading commercial country of the world, and were enforcing the need for changes in, and expansions of, those many branches of the private or semi-private law which were affected by the consequent social, industrial, and economic changes.

We must now turn to the consideration of the way in which the working of the constitution, intellectual developments, the growth of the overseas dominions, and industrial changes, are reflected in the law of this century. In this chapter I shall deal with public law, and, in the two following chapters with the

enacted law and the professional development of the law. In all departments of the law, but more especially in the departments of public law and the enacted law, the historical developments which I have sketched, and the character of the statesmen who shaped their course, played a large part in determining the manner in which the existing law was interpreted and applied, and the contents of the measures which were passed to adapt it to new political, social, and economic needs.

II

Local Government

The topic of local government is only one among the many topics which fall under the rubric Public Law; and public law is only one of the many branches of the body of English law. It is impossible therefore to describe the local government of England in the eighteenth century in any detail. And it is the less necessary, since the history of the whole subject has been covered with entire adequacy in the work of Lord and Lady Passfield (Mr. and Mrs. Sidney Webb),[1] which is remarkable for the success with which its authors combine the qualities of literary style and human interest with the qualities of erudition and accuracy. But some account of the salient features of English local government in the eighteenth century is necessary for two reasons: In the first place, it is as necessary for a proper understanding of some of the characteristics of the whole body of English public law in that century as it was necessary for understanding it in earlier periods.[2] As Maitland has justly said, "a history of the eighteenth century which does not place the justice of the peace in the very foreground of the picture, will be known for what it is—a caricature"; because, unless the justice of the peace is given this prominent place, we can never know "what the laws made in Parliament, the liberties asserted in Parliament, really meant to the mass of the people."[3] In the second place, it is to the machinery of local government in the eighteenth century that we must look for the origins of many specialized branches of public law, which have, in later days, become important bodies of legal doctrine—the law, for instance, as to roads,[4]

[1] The Parish and the County; the Manor and the Borough; Statutory Authorities; English Poor Law History; the Story of the King's Highway; English Prisons under Local Government; the History of Liquor Licensing in England.

[2] For some account of this topic in earlier periods see vol. ii 369-405; vol. iv 108-166; vol. vi 55-61; for the local courts through which much of the loca government was long carried on see vol. i 5-32, 65-186.

[3] Collected Papers i 468-469.

[4] Below 299-322.

rates,[1] the poor,[2] vagrants,[3] and prisons.[4] Of the origins of some of these specialized branches of law I shall speak later in this section.[5] But I must first describe the salient features of the machinery of local government in the eighteenth century, and their relation to the whole body of the public law of that century.

We have seen that under the Tudors a new system of local government, based mainly on the justices of the peace and the parish, had been established; but that this system had not wholly superseded the mediæval courts and officials of counties, hundreds, boroughs, and franchises. It had been pieced on to the older organization; and though in some cases the new system superseded the old, in many cases it controlled it and used it.[6] We have seen that in the manner in which the justices of the peace performed their functions under judicial forms, and in their independence subject only to the law, they had inherited much of the spirit of the mediæval system;[7] and that, like the mediæval system, the Tudor system rested on a basis of unpaid service, which was obligatory on all classes of the community, from the dignified lord lieutenant to the humble parish officers.[8] It was a complex system because it had developed gradually, and because it embodied many ideas taken from many different periods in English legal history. But, because it fostered the qualities of independence and responsibility, it educated all the many classes of citizens who were compelled to take their share in working it. In the Tudor and early Stuart period, this complex system was kept in working order by the strict supervision of the Privy Council, the Star Chamber, and the Provincial Councils;[9] and we have seen that, without some knowledge of the chief features of this complex system thus controlled, it is impossible to understand either the strong or the weak points of the balanced Tudor constitution,[10] or the strength of the opposition to the Stuart kings.[11] These self-governing officials and communities, who had been educated by their unpaid and often compulsory service, resented a strengthening of central control which threatened to diminish their independence, a control which, because it resulted in an increased efficiency, was certain to be very expensive.

Just as in the Tudor and Stuart periods the system of local government helps us to understand the underlying causes which shaped the public law of these periods, so, in the eighteenth century, it helps us to understand the manner in which the men of that century built up, on a basis of legislation, custom,

[1] Below 276-299. [2] Below 257-276. [3] Below 177-180.
[4] Below 180-183. [5] Below 256 seqq. [6] Vol. iv 137-166.
[7] Ibid 136-137, 142-143, 164-165.
[8] Ibid 76-77, 122-125, 156; vol. vi 60. [9] Vol. iv 77-80; vol. vi 56-58.
[10] Vol. iv 165-166, 188-190. [11] Vol. vi 58-66.

and convention, that balanced constitution of separated powers which won the admiration of foreigners as well as Englishmen.[1] I shall describe its salient features under the following heads: the machinery inherited by the eighteenth century; the survival of mediæval ideas; the growth of modern ideas; the relations of local and central government; the beginnings of special bodies of law connected with local government; the strong and weak points of the eighteenth-century system of local government.

The Machinery Inherited by the Eighteenth Century

The machinery of local government which the eighteenth century inherited was, in its general outlines, the machinery which I have described in volume IV of this History. All therefore that it is necessary to do at this point is to recall its salient features.

The justices of the peace were the most important and the most ubiquitous organ of local government. At their quarter sessions they (in theory)[2] met the whole county—the sheriffs, the bailiffs, the constables, jurors from each hundred, and jurors from the body of the county. There they exercised their jurisdiction in criminal cases by means of the presentments of grand juries and trial by petty juries; and, under similar forms of presentment, indictment, and trial, they still did, as they had done in mediæval days, much administrative work. Accusations of all kinds of negligences and misfeasances and nuisances against both officials and private citizens were presented, the offenders were punished, and redress was ordered.[3] But much administrative work was also done out of sessions. Single justices, and groups of two or three or more justices, had been given extensive powers by many statutes of the sixteenth and seventeenth centuries—powers in relation to the poor law, to rating, to highways, to bridges, to gaols, to sewers, to the licensing of ale houses, to apprentices, to trade, to the fixing of wages, to the laws relating to religious nonconformists.[4] The quarter-sessions could take independent action on many of these matters;[5] and in some cases, e.g. in rating cases, could hear appeals.[6] The result was that partly by the necessity of the case, and partly by reason of the pressure of the central government in the sixteenth and early seventeenth centuries, the sessions of the justices had begun to be differentiated. Special sessions were sometimes held for such

[1] Below 714.

[2] In fact, down to the end of the eighteenth century, quarter sessions were often composed only of two or three magistrates, Webb, Local Government, the Parish and the County 422-424.

[3] Vol. iv 142-145. [4] Ibid 138-142. [5] Ibid 144. [6] Ibid.

purposes as the fixing of wages, for the licensing of ale houses, or the control of the highways.[1]

All this judicial and administrative work necessitated some clerical assistance. We have seen that it was from the custos rotulorum that this clerical staff originated. He appointed the clerk of the peace who was responsible for drawing up the records and for the other clerical work of the sessions.[2] Like other mediæval officials the clerk of the peace held a freehold office.[3] "He is nobody's servant except the servant of the law."[4] He held his office for life, and could only be removed in the manner provided by statute;[5] so that a condition inserted in his appointment that it is to be terminable on notice is void.[6] Some clerical assistance was also given by the clerks to the various sessions of the justices, who were appointed by the justices themselves.[7] But, apart from the clerk of the peace and these other clerks, the justices had, at the beginning of the eighteenth century, no other paid assistants. The law still, as in mediæval times, imposed on all citizens the duty, not only of serving gratuitously as jurors, but also of serving, equally gratuitously, in many other offices, which had once been part of the machinery of the older communal and franchise courts, but which were now tending to become part of the machinery of the new unit of secular government—the parish.[8] It was through these agencies that the justices did the greater part of their administrative work.

The Tudor legislation had made the parish the unit of local government.[9] In the Middle Ages, when the parish was a unit of ecclesiastical government, the general rule was that all parishioners could take part in the parish meeting held in the vestry;[10] and it continued to be the presumption of the law that this open vestry was the normal type of vestry.[11] But differences in the size and circumstances of different parishes caused variations in the types of vestry; and the freedom of action possessed by all units of local government allowed variations from this type of vestry to grow up. Moreover, as all real power was vested

[1] Vol. iv 146-149. [2] Ibid 151-152.

[3] For the freehold offices by which the courts were staffed see vol. i 246-251; for the nature of the proprietary interest which their holders enjoyed see vol. ii 355-357; for similar freehold offices in other departments of the central government see below 501-506; for the numerous freehold offices held by officials of the City of London see Webb, Local Government, the Manor and the Borough 680-681.

[4] Lord Leconfield v Thornely [1926] A.C. at p. 15 *per* J. B. Mathews K.C. *arg.*

[5] 1 William and Mary c. 21 § 6 which provided that he might be removed on a complaint in writing to the quarter sessions if he misdemeaned himself in the execution of his office; 27, 28 Victoria c. 65 § 2 provided that he might be removed for misconduct other than misconduct in the execution of his office.

[6] Lord Leconfield v. Thornely [1926] A.C. 10.

[7] Vol. iv 150; below 230. [8] Vol. iv 122-125, 151, 156, 157, 158.

[9] Ibid 155-160. [10] Ibid 152-155. [11] Ibid 159 n. 3.

in the officials of, and the leading men in, the parish, customs which restricted the membership of the vestry to this close body were easily formed, and were sanctioned by the courts—and so close vestries arose.[1]

By the end of the seventeenth century the parish, represented by its vestry, open or closed, had, over the greater part of England, stepped into the place of the older communities of manor, township or tithing, and hundred. The petty constables, formerly the officials of townships or tithings, had come to be regarded as its officials. Some of the officials possessed by some parishes, such as a hayward or a hogwarden, and some of its activities in relation to cattle and rights of common, showed that it had absorbed duties formerly exercised by the manorial courts.[2] Its original officials, the church-wardens, were associated with the new officials, the overseers of the poor, which the Elizabethan poor law had created ;[3] and surveyors of highways, who were appointed by the churchwardens and constables, were, from the first, associated with it.[4] The high or chief constables had originally been associated with the hundred. But, at the beginning of the seventeenth century, they had come to be the appointees of quarter sessions, and the chief executive agents in the dealings of quarter sessions with the parish and its officials.[5]

The parish, which had thus stepped into the place of the older units of local government, had inherited much of their spirit. It was an independent self-governing unit, administered by officials serving for short terms compulsorily and gratuitously, and performing its functions under the supervision of the justices of the peace. But these officials had had at their back the organism and the local patriotism of the parish, just as the justices had at their back the organism and the local patriotism of the county.[6]

And this local patriotism of the county and the smaller units of local government had, from early mediæval days, been a very real thing. Times, it is true, had changed, and a revolution in government had occurred since the early mediæval days when the sheriff, acting through the county and hundred courts and his tourn, had ruled the county.[7] But the justices of the county in their quarter sessions had inherited the position of the old county court ; and the single justice or the groups of justices in their different districts had inherited the position of the hundred

[1] Vol. iv 159-160. [2] Ibid 158. [3] Ibid 157. [4] Ibid 156.

[5] Ibid 123-124 ; it was said in the House of Commons in 1621, Notestein, Commons Debates v 65, 318, that the petit constable was the elder brother of the high constable, and that, while the former was " an ancient officer of the common Lawes," the latter had merely a statutory authority, so that he could not issue commands to the petit constable.

[6] Vol. iv 162. [7] Vol. i 65-82.

court and the tourn. The quarter sessions worked by means of a procedure of presentment and indictment which was essentially similar to the procedure of the eyre and the tourn ; [1] both the quarter sessions and the parish assumed the indefinite power to make by-laws for the good of their districts which these older communities had exercised ; [2] and, consequently, the justices, the officials of the parish, and the vestry represented the county and the smaller units of local government, as the old communal courts and officials had represented the districts over which they had once exercised jurisdiction. Moreover, the survival of this communal feeling was helped by the survival of some of the old communal courts and officials. Sheriffs, shorn it is true of their former state, still acted as the executive agents of the central courts and of the justices ; [3] and at county courts held by them the county members were elected to Parliament.[4] Coroners were still elected for the county.[5] In the lord lieutenants the counties had acquired new heads of their military forces ; and, since they were generally peers, they were in close touch with the higher officials of the central government.[6]

Such, in broad outline, was the system of local government which prevailed over the greater part of England at the end of the seventeenth century. But it did not prevail over the whole of England. In some parts of England the local government was in the hands of individuals or corporations who possessed a royal franchise. With the exception of the Counties Palatine and one or two larger liberties, the government of which had been to a large extent assimilated to the rest of the country, these franchises had ceased to be of much importance in the country at large.[7] A few lords possessed a leet jurisdiction ; and though courts leet lingered on in a few places, they were decadent at the end of the seventeenth century.[8]

It was only in the boroughs that the franchise jurisdictions were an important part of local government ; and in the more important boroughs, which were counties in themselves, the county organization of justices and parishes was tending gradually to absorb older franchise courts and older gild organizations.[9] But in all these boroughs, at the beginning of the eighteenth century, abundant traces of older courts and councils survived.[10] In all boroughs their charters, which defined the governing body of the borough, introduced divergencies from the scheme of local government which prevailed in the country at large ; and

[1] Vol. iv 136 n. 2, 142-144 ; below 146-151 ; for the eyre see vol. i 265-273 ; for the tourn see ibid 76-82.
[2] Vol. ii 378 ; vol. iv 158 ; below 234-235.
[3] Vol. iv 122.
[4] Below 570-571.
[5] Vol. iv 122.
[6] Ibid 76-77 ; below 238-239.
[7] Vol. iv 127.
[8] Ibid 127-131.
[9] Ibid 131-133 ; below 140.
[10] Vol. iv 132.

this divergence was increased by the large power which the boroughs exercised, without much hindrance from their charters, of varying and adapting their constitutions according to their needs.[1]

Charles II and James II attacked the borough charters for electioneering purposes. Many charters were forfeited as the result of quo warranto proceedings, or were surrendered as the result of a threat of these proceedings, in order that new charters might be granted which would give the Crown control over the governing body of the corporation, and so enable it to control the election of members of Parliament.[2] But, just before the Revolution, James II promised to restore all charters not legally forfeited, and all surrendered charters, provided that the surrenders had not been enrolled.[3] Many of the old charters were restored after the Revolution; and the result was that a considerable element of uncertainty was introduced into the validity of the charters of many of the boroughs—"for the whole of the eighteenth century, hardly any municipal corporation could feel assured that any particular element in its constitution, or any particular form that it affected in its practice, would be upheld by the courts at Westminster, if any person chose to dispute an election."[4] In 1743 a bill was introduced into the House of Lords to remedy this evil, which was sometimes aggravated by the rivalries arising out of contested Parliamentary elections.[5] The bill was rejected; but the debate upon it indicates that the boroughs were accustomed to order their affairs as they saw fit, without much regard to old charters, which were sometimes unintelligible to the men of the eighteenth century on account of their antiquity, and often unsuited to their needs.[6] Thus the boroughs developed in the eighteenth century, as they had developed in earlier centuries, on diverse lines; and this tended

[1] Vol. iv 131 and n. 6.
[2] Vol. vi 210-211.
[3] Webb, The Manor and the Borough 269.
[4] Ibid 270.
[5] The genesis of this bill was a litigation as to the election of a mayor which arose out of such a dispute, Parlt. Hist. xiii 45-46.
[6] Lord Romney said in the debate, "that the general state of most of the corporations of this kingdom is necessarily such, that very few of the members can be supposed to understand the charter from which they derive their authority, and that therefore they do not regulate their conduct by consulting it as occasion may demand, but by enquiring, how their predecessors acted in similar cases upon the presumption very generally admitted, that the precedent on which the present officer founds his behaviour was likewise justified by some former precedent, and that the series of precedents was so carried up to the first institution of the corporation, when the charter must be supposed to have been critically explained, and accurately understood. Thus . . . in many corporations a knowledge of their own privileges is merely traditional. Example supplies the place of rule, and the charter, however carefully preserved, is seldom consulted, because it is not understood." Further, "it is not unlikely that many charters may be disregarded, because they cannot possibly be observed, or without greater inconvenience than the forfeiture of them would produce," ibid 58.

to preserve and develop a borough patriotism—a patriotism which was, and always had been, considerably more intense than the more widely diffused patriotism of the counties and the smaller units of local government.

The system of local government which the eighteenth century had inherited, was remarkable for the diversity of the origins of its different parts, for the autonomy of the courts and officials by which it was conducted, and, consequently, for a curious combination of old ideas and old machinery with a power and a will to adapt these ideas and this machinery to new needs. These characteristics of the system of local government had been emphasized by the Great Rebellion, and, as the result of the Revolution, they became its dominant characteristics during the whole of the eighteenth century. If, therefore, we would understand the machinery of local government which the eighteenth century inherited, we must look at the effect of the Great Rebellion and the Revolution on the machinery of local government which the Tudors had created.

We have seen that, during the whole of the Tudor period, and right down to the legislation of the Long Parliament, all the units of local government were strictly controlled by the central government. During the whole of that period the Council, the Star Chamber, and the Provincial Councils were beginning to construct a body of administrative law.[1] The victory of the Long Parliament meant the collapse of that control. For the future the only effective control to which the units of local government were subject was, first the legislative control of Parliament exercised by means of statutes, and, secondly, the control of the common law, exercised by means of the prerogative writs, by means of the criminal processes of indictment or information, or by means of civil actions brought either by aggrieved persons against the officials or units of the local government, or by one unit of the local government against another.[2] The monarchy was restored in 1660; but it was a monarchy which was obliged to work with Parliament; and the Star Chamber was not restored. Hence the executive government of the later Stuart Kings was much weaker than it had been under the Tudors or the earlier Stuart Kings. It was unable to exercise those extensive powers of control over the officials of the local government which it had formerly exercised.[3] It is true that for a short time longer the judges of Assize acted as a link between the local and the central government;[4] and, to the end, the judges of Assize, on the presentment of the grand jury, would take notice of the conduct by the justices of the peace of particular parts of the local

[1] Vol. iv 77-80; vol. vi 56-58.
[2] Below 241-254.
[3] Vol. vi 215-216.
[4] Vol. i 273.

government—e.g. the state of the gaols. Thus at the Lent Assizes of 1818 Garrow B. visited the gaol at Derby, and severely censured the county for its neglect in maintaining it. The grand jury made a presentment on the matter; but nothing was done till 1820. In that year Garrow B. again visited the county, and made it take action by a threat to fine it if it did not.[1] But such action was rare. From the beginning of the eighteenth century, the judges of Assize confined themselves almost entirely to their judicial work. Thus the central government, though it could advise the justices and call their attention to particular parts of their duties, lost its powers of control. The Webbs have said: [2]

> If we were asked to name a period in English history during which the county possessed the largest measure of self government, when its local administrators were most effectively free from superior control, either of the National Executive, Parliament, or the Law Courts, we should suggest the years between 1689 and 1835, or, more precisely, the century that elapsed between the accession of the House of Hanover and the close of the Napoleonic wars.

Mainly for this reason the justices came, in the course of the eighteenth century, to be permanent officials. The manipulations of the bench, which had occurred for political reasons under the Stuarts, in Anne's reign, and even occasionally in George I and George II's reigns, ceased.[3] It is true that for some time longer the party in power appointed its friends; [4] but even this mode of influence ceased; and, by the end of the century, the county justices were almost invariably appointed on the advice of the lord lieutenant. The Lord Chancellor could always add names on his own initiative—though at the end of the century he rarely did so; [5] and he could always remove them. But he used his power of removal very sparingly. Lord Eldon laid it down that "however unfit a magistrate might be for his office, either from private misconduct or party feeling, he would never strike him off the list until he had been convicted of some offence by the verdict of a court of Record." [6]

There were many uniformities in the system of local government which the eighteenth century had inherited. Throughout England, in the counties as well as in the boroughs, there was a system of unpaid service which was often also compulsory; and the main part of the work was done by the justices of the peace

[1] Cox, Three Centuries of Derbyshire Annals ii 13; cp. Webb, the Parish and the County 307 n. 1, for a case of 1783 when the county of Shropshire was fined £2000 for not providing a proper place to hold the courts in.

[2] The Parish and the County 309-310; cp. E. G. Dowdell, A Hundred Years of Quarter Sessions, the Government of Middlesex 1660-1760 14-15.

[3] Vol. i 291; Webb, The Parish and the County 380. [4] Ibid 381.

[5] Vol. i 291 n. 9; Webb, The Parish and the County 384. [6] Ibid 380-381.

in their various sessions. As in the Middle Ages,[1] there is a great similarity in the contents of the records of the different units of local government. Even the differences between the county and the borough records are not very wide;[2] for, as in the Middle Ages, the differences between town and county were not, except in the largest cities, as strongly marked in the eighteenth century as they have become in our own days.[3] All this uniformity was the result partly of the pressure of the power of the Crown in the earlier part of the mediæval period,[4] and partly of the pressure of the new centralized government of the Tudors upon the new institutions of local government which they had created.[5] But though these causes had created many uniformities, they had left room for the survival and growth of many diversities. The units of local government had never ceased to possess, subject to the law, a large measure of autonomy; and the increase in the autonomous character of the units of local government, which was a result of the Great Rebellion and the Revolution, tended to preserve and to strengthen these diversities.[6] Local customs varied the part which the inhabitants of the parish took in its management.[7] The existence of a franchise might, occasionally in the country and more often in a borough, create differences in the style and jurisdiction of the courts through which the government was administered.[8] The personality of some member of the bench of justices might alter the whole tone of the government of a county or borough;[9] for local government had not yet been mechanized as it is now mechanized in this age of machines.

Some of the results of these diversities, which the weakening of the control of the central government tended to intensify, were unfortunate. We have seen that the weakening of this control had unfortunate effects upon the working of the poor law;[10] and we shall see that it did not make for efficiency in other

[1] Vol. ii 389-390.

[2] I have reached this conclusion after looking through the following records: J. C. Atkinson, North Riding Sessions Records; Shropshire County Records; J. C. Cox, Three Centuries of Derbyshire Annals. With these county records I have compared E. G. Dowdell's interesting book on the Middlesex Quarter Sessions 1660-1760.

[3] "The Municipal Borough, even as late as the eighteenth century, continued in most cases to be an agricultural community, sometimes keenly interested in arable common fields and hay meadows, and nearly always in common pastures. The Corporations had therefore a whole array of what we may call agricultural functionaries of one sort or another—Haymakers, Grassmen, Poundkeepers or Pound-drivers, Woodwards, Tenders of the Town Wood, Neatherds, Pasture-masters or Field-drivers, Common-keepers or Tenders of the Common, Mole-catchers, Swine herds or Hog-drivers," Webb, The Manor and the Borough 303.

[4] Vol. ii 396-400. [5] Vol. iv 71-80.

[6] Below 137-142. [7] Above 129; below 138-139.

[8] Cox, Three Centuries of Derbyshire Annals ii 275-280, cited vol. iv 130 n. 1.

[9] Below 142-146. [10] Vol. vi 349-351; below 275.

departments of local government, such as highways,[1] gaols,[2] and police.[3] But it had one beneficial result, which was so important that, in the eighteenth century, it outweighed its many unfortunate results. The autonomy of this system of local government, and the gratuitous and often compulsory services which it demanded from all those persons who worked it, educated many different classes in the nation, and thus helped to render workable that unique system of constitutional government which the Revolution had established. This result of the eighteenth-century system of local government was due partly to the characteristics which it had inherited from different periods in the history of English law, and partly to characteristics which it developed during this century. These characteristics can be summarized as follows:

(1) The units of local government were characterized both by a continuity in their historical development, and by an individuality in the manner in which they were able to develop so as to meet the needs of their own day and district; and these characteristics led to a survival of many mediæval ideas and institutions.

(2) These qualities of historical continuity and individuality were fostered and emphasized by the manner in which the system of local government was developed by the Legislature during the eighteenth century. A certain number of general statutes, and very many local statutes, added to the duties and powers of the justices of the peace and other officials and units of the local government.

(3) But even with the help of this legislation the existing officials and units of local government were not able, in many urban and suburban districts, to fulfil their duties adequately. Therefore in the second half of the century the Legislature created many *ad hoc* authorities to perform functions which the existing authorities had shown themselves unable to perform.

(4) The manner in which the duties of all these authorities, old and new, was performed was left very much to the discretions of the justices and the other authorities upon whom they were imposed. They, in the exercise of their discretion, devised machinery for their performance which was often new, often extra-legal, and sometimes even illegal. The result was that much of the machinery of local government was, like much of the machinery of central government, based on conventions. With these four characteristics of the system of local government I shall deal in the two following sections.

[1] Below 154, 171-172. [2] Below 181-183. [3] Below 144-145.

The Survival of Mediæval Ideas

In many different parts of the local government of the eighteenth century we can see the survival of mediæval ideas—"England," says M. Halévy,[1] "was a museum of constitutional archæology where the relics of past ages accumulated." In the first place, this phenomenon is apparent in the diversity of some of the units of local government. In the second place, it is apparent in the mediæval machinery used by the justices and other organs of a local government. In the third place, it is apparent in the judicial control to which all these organs of local government were subject.

(1) *The diversity of the units of local government.*

This diversity is apparent in the units of the county government and in the boroughs—but more especially in the latter. Moreover, both in the counties and in the boroughs the personality of their rulers made for far more diversity in the conduct of the government than is possible under the more democratic, the more minutely regulated, and the more bureaucratic regime of the present day. I shall give illustrations of this diversity under each of these three heads—the county government, the boroughs, and the influence of personality.

The county government.—We have seen that in some places in the country there still existed many different sorts of courts—courts baron, county and hundred courts, and courts leet—which exercised a rapidly diminishing jurisdiction.[2] The only one of these courts which is important, from the point of view of local government, is the court leet,[3] and the courts of one or two palatinates and larger liberties.[4] We have seen that the existence of the court leet is recognized by statutes of George I's, George II's and George III's reigns, and by a thin stream of cases from the eighteenth and nineteenth centuries.[5] Where this court existed it performed some of the functions of the parish—e.g. it could appoint constables[6] and other officers; and some of the palatinates and larger liberties might have a separate

[1] History of the English People in 1815 (Engl. tr.) 98. M. Halévy is here speaking of local government; we shall see that the same thing can be said of the central government, below 499.

[2] Vol. i 69-82, 133-138, 181-187; in 1756 an Act was passed to regulate the proceedings in personal actions in the courts baron of the manors of Sheffield and Ecclesall in the county of York, 29 George II c. 37.

[3] Vol. i 134-138.

[4] Ibid 109-132; Webb, The Parish and the County 313-318.

[5] Vol. i 137 nn. 6 and 7.

[6] Vol. iv 123-124; Webb, The Manor and the Borough 70, 73-74.

commission of the peace.[1] The existence of these franchises therefore introduced variations in the normal type of local government which was based upon the county officials, the justices of the peace, the high constables of the hundred, and the officials of the parish.

In the organization of the parish many local variations were allowed to spring up. Thus the Webbs say of the appointment of churchwardens that, " their number and the method by which they were chosen depended entirely on the immemorial custom which each particular parish had unconsciously evolved for this purpose. The law courts would uphold practically any proved local usage not involving the compulsory service of persons legally exempted." [2] And what is true of the methods of the appointment of churchwardens, is true also of the different variations of parish government, which were evolved under the pressure of the varying needs of different districts.

In parishes of the thinly populated rural type the government fell into the hands of the principal inhabitants—the clergyman, the squire, the innkeeper, the miller, and the principal farmers. " The official relationships between the parties were inextricably woven into the economic relationships that existed between the same individuals in their private capacities." [3] Hence " There was no formal procedure, no rigid adherence to law, and no regular or systematic outside supervision." [4] In some larger rural parishes the officials of the parish did the routine work; but they took care to get for any new or important resolution the consent of an open vestry, which was peacefully run by the principal inhabitants.[5] In urban or suburban parishes, on the other hand, the inhabitants refused to take the thankless and unpaid parish offices; and the government of the parish fell into the hands of poor, illiterate,[6] or unprincipled persons, who took these offices for what they could make out of them,[7] or,

[1] Webb, The Parish and the County, 314; vol. i 111, 114; 13 George II c. 18 § 7 made provision for rating in liberties with a separate commission of the peace; 15 George II c. 24 provided that the justices of liberties might commit to the county house of correction.

[2] Webb, The Parish and the County 21; " it might be . . . service by simple rotation among the parishioners who were liable; it might be service in respect of the tenure of particular lands; it might be appointment at the free choice of an open meeting of all the parishioners; it might be co-option of a close or ' select ' body; it might be simple nomination at the choice of the retiring churchwardens; it might be appointment by the incumbent or . . . by the ground landlord and patron of the living, by the municipal corporation . . . or . . . even by the lord of the manor; or it might be any combination of these methods," ibid 21-22.

[3] Ibid 48. [4] Ibid. [5] Ibid 51-60.

[6] In 1753 it was said of the overseers, " it is well known that many hundreds are annually elected to that office, who are so far from being able to write that they cannot read; neither can they always afford to pay those who can," Parlt. Hist. xiv 1325.

[7] Webb, The Parish and the County 61-79.

occasionally, into the hands of some other unprincipled person, who dominated the parish, and used his opportunities to maintain and increase his powers and his gains by corrupt methods.[1] In a few parishes in the eighteenth century, in more parishes at the beginning of the nineteenth century, the parish was run by a turbulent meeting of all the parishioners, in which the poorer and more ignorant reduced government to a chaos.[2]

It was the inconveniences of open vestries of this kind which induced the courts somewhat easily to presume a custom which restricted the government of the parish to a close vestry.[3] In the parishes which were ruled by a close or select vestry the governing body was a body of a dozen or two persons, "generally serving for life and filling up their numbers by co-option."[4] In some cases it can be proved that the custom which originated the close vestry was by no means immemorial;[5] but in other cases the close can claim equal antiquity with the open vestry.[6] "It is not without significance that the most interesting group of examples of a select vestry governing by immemorial custom appears to be historically connected with the occupation or tenure of particular 'husband-lands' or farms";[7] and many of the Tudor statutes seem to contemplate government by the chief or the most substantial inhabitants.[8] Moreover, the fact that the parish was stepping into the position of the older manorial courts "with their juries of twelve or twenty-four in whose selection the inhabitants had no share,"[9] helped to make a government by a close body seem the natural form of government. Though attacked in the House of Commons at the beginning of the eighteenth century,[10] the close vestries successfully resisted, and it was not till the following period that their reform was begun.

Thus, although there was considerable uniformity in county government, there were also considerable diversities, which were due occasionally to historical causes, such as the survival of a franchise or a liberty; but generally to the autonomy which the parish, like the other units of local government, had from the first possessed. This autonomy enabled its government to be

[1] Webb, The Parish and the County 79-90, where an interesting account is given of the doings of Joseph Merceron at Bethnal Green at the end of the eighteenth and the beginning of the nineteenth centuries.

[2] Ibid 91-103; "in 1734 we hear incidentally of 'the clamorous proceedings and irregular behaviour of the great multitude of persons who generally attend the vestries of the parish of Whitechapel'," ibid 91, citing a petition from the rector and the principal inhabitants of Whitechapel to the House of Commons, Feb 22, 1734.

[3] Above 130.

[4] Webb, The Parish and the County 173.

[5] Ibid 182-188.

[6] Ibid 175-178.

[7] Ibid 179.

[8] Vol. iv 161-162.

[9] Webb, The Parish and the County 178.

[10] Ibid 248-260.

moulded in a manner which corresponded to the character or needs of the parish, and to be shaped in some cases by the deliberate resolution of its inhabitants.[1] We shall now see that the same two causes operated more strongly in the case of the boroughs to produce many diversities.

The boroughs.—We have seen that the boroughs were communities which had a franchise or franchises, that they usually had charters, but that it is difficult to point to any other differences which distinguish the whole series of different communities, which called themselves boroughs, from similar communities existing in rural areas.[2] Many, as late as the eighteenth century, were agricultural as well as trading communities, and therefore "had a whole array of what we may call agricultural functionaries."[3] We have seen that the charters, which most boroughs possessed, left them very free to develop their own constitutions in their own way.[4] Considerable use was made of this power.

> Many of the officers actually at work in the Municipal Corporations, exacting fees and controlling the conduct of the inhabitants, had no better sanction for their existence and activities than resolutions of the governing body or immemorial custom. And with regard to the qualification to be required in a burgess or a freeman, though this was, in a sense, the very foundation of the corporation, the changes were so frequent and so casual that it is clear that they were hardly regarded as alterations in the constitution.[5]

In fact the borough charters tended to differentiate the borough communities from the county communities, and, by so doing, to accentuate the autonomy which they possessed. It is for this reason that, all through the eighteenth century, and right down to the Municipal Corporation Act of 1835, there is to be found in the boroughs an infinite variety of governmental mechanism.[6]

It is true that the same causes which made for some uniformities in the county government, operated also in the boroughs. Close governing bodies were established in the boroughs for much the same reasons as led to their establishment in parishes.[7] The large boroughs got a separate commission of the peace, with or without a power to exclude the county justices, and a parochial organization.[8] But just as many of the older judicial courts survived longer in the boroughs;[9] just as in many boroughs

[1] In some cases "we find recorded the deliberate establishment by the incumbent, the parish officers, and the principal inhabitants of a close body or select vestry, which suddenly takes the place of the open meeting," Webb, The Parish and the County 184; for instances see ibid 184-188.

[2] Vol. i 138-141; vol. ii 385-386; vol. iv 131-133.

[3] Webb, The Manor and the Borough 303, cited above 135 n. 3.

[4] Above 132. [5] Webb, The Manor and the Borough 273.

[6] Vol. i 141 n. 5; vol. iv 132-133.

[7] Webb, The Manor and the Borough 272-274, 368, 403.

[8] Vol. iv 133. [9] Vol. i 142-143, 148-151; vol. iv 132-133.

specialized courts were developed ; [1] so, in the sphere of local government, many different kinds of functionaries appropriate to a trading community or needed for a more densely populated district,[2] and many different kinds of government, were devised.[3] And, for the same reason, the distinction between judicial and administrative functions was realized in the boroughs earlier and more clearly than in the counties, and these functions were entrusted to different bodies.[4]

For all these reasons diversity is as much the note of the borough constitutions in the eighteenth century as it was in the Middle Ages. But between the many different communities called by that name there was one clear line of demarcation. In the more important boroughs some of their members or officers were, either by charter or prescription, by virtue of their office justices of the peace : the others had not got this privilege.[5]

The first class of these boroughs was marked by many diversities in their constitution. But, as the Webbs have pointed out, they fall into three main categories : [6] first, the larger number, in which a close body, recruiting itself by co-option, elected the head of the corporation and performed all the functions of government. Secondly, in some of the largest boroughs and the City of London there was a body of freemen, recruited by apprenticeship, which had electoral rights " varying from the mere choice of a mayor from among the members of the close body, up to the unrestricted election of the governing body and principal officers." [7] Thirdly, in some boroughs the whole of the freemen exercised some or all of the powers of government. In most of these boroughs we can see the same tendency as that which had been long at work in the counties—the tendency to concentrate all the real powers of government in the inner circle of the members of the corporation who filled the office of justice of the peace.[8] But this is not true of all the boroughs—one great exception was the City of London.[9] So that, in spite of this tendency which made for uniformity, many diversities still remained.

Amongst the other boroughs, whose members or officers were not by virtue of their office justices of the peace, there was an infinite diversity in the kinds of government. If we look at what the Webbs have called the manorial boroughs—that is boroughs which had developed by various routes from a lord's court—we see " every gradation from a subjection [to a lord] only very slightly modified by privilege, to a complete system of

[1] Vol. i 142, 149-150.
[2] Webb, The Manor and the Borough 304-309.
[3] Ibid 202-203.
[4] Ibid 360-367.
[5] Ibid 266-267.
[6] Ibid 382-383.
[7] Ibid 383.
[8] Ibid 386-390.
[9] Ibid 394, 402.

burghal self-government." [1] If we look at urban centres like Manchester and Birmingham, which were not chartered boroughs at this period, we can see striking illustrations of the manner in which the autonomy of the units of local government enabled mediæval machinery to be adapted to modern needs. The court leet of Manchester, held by the steward of the lord of the manor of Manchester, and the borough reeve elected by the jury of the court leet, developed an efficient municipal government, which lasted till the town was incorporated in 1842. Since the lord's steward selected the jury he long had some control over the government of the town.[2] Similarly the government of Birmingham was developed from a manorial court leet. But at Birmingham the court had become practically independent of the lord, since his steward, though he held the court, did not select the jury. The selection was in the hands of a low bailiff, who was chosen at the previous court. And the court itself ceased to be the governing body of the town at a much earlier date than at Manchester. Its government, from 1776 onwards, passed to a statutory body of Street Commissioners, till the town obtained a charter of incorporation in 1851.[3]

The influence of personality.—The mediæval as contrasted with the modern state was characterized by the absence of a strong central government. In fact, as we have seen, it was the absence of such a government which was the reason for the emergence, in many different countries, of feudal ideas and institutions.[4] The powers of government were split up among the larger landowners, because they were able to wield effective power over the land which they held. In these circumstances the personality of the ruler made all the difference to the condition of the district over which he ruled. We have seen that, as the result of the Great Rebellion and the Revolution, the power of the central government in England had been weakened.[5] It could no longer exercise the control over the units of local government which had been exercised by the Tudors and the first two Stuarts. Hence we find that in the eighteenth century differences in the personality of the rulers of different districts

[1] The Manor and the Borough 203; "if a single highly evolved organisation had, at all the various stages of its development from the Lord's Court of a rural Manor right up to the most fully developed Municipal Corporation, been successively photographed for the information of future generations, these different pictures could hardly have represented the several stages more strikingly than do the hundreds of distinct local authorities simultaneously existing in the eighteenth century," ibid.

[2] Ibid 99-113.

[3] Ibid 157-160; that the court leet still played a considerable part in the government of Westminster is clear from 29 George II c. 25 which regulates its appointment of constables and the appointment of the leet jury, and from 31 George II c. 17 which amended and extended the earlier Act.

[4] Vol. i 17-19.

[5] Above 133.

produce very considerable differences in the conduct of the local government in those districts. It is true that such differences must always affect the conduct of government. But they are much less apparent when the units of local government are controlled by a central government, which exercises its control through a strong and intelligent bureaucracy, and when the local government itself works through a staff of paid experts. Neither of these conditions prevailed in the eighteenth century; and the result was that in that century, as in the Middle Ages, great diversities in local government were produced by the personalities of those who conducted it. Let us look at one or two illustrations.

The best governed of all the parishes in England was the parish of St. George's, Hanover Square. This was due to the fact that its inhabitants were, for the most part, members of the nobility and gentry, and that it was governed by those members of the nobility and gentry who "took an interest in the good government of their parish."[1] They organized a paid police force; and, "strengthened by successive local Acts, paved, watched, and lighted the streets and squares; carried out a certain amount of scavengering and put down nuisances; systematized the assessment and collection of rates, and put a stop to illegal exemptions; and, in the administration of the Poor law, voluntarily anticipated by several years many of the reforms of 1834."[2]

In urban and suburban districts, and more especially in Middlesex, it was impossible to get men of education and fortune to act as justices. Burke said of the Middlesex justices in 1780 that they were "generally the scum of the earth—carpenters, bricklayers, and shoemakers; some of them were notoriously men of such infamous characters that they were unworthy of any employ whatever, and others so ignorant that they could scarcely write their own names."[3] Hence we get the notorious "trading justices," who figure in many of the novels and plays of the period.[4] It is not surprising that robberies and crimes of violence in London and the suburbs increased to such an extent that "at Kensington, as late as the beginning of the nineteenth century, it was customary on Sunday evenings to ring a bell at intervals, in order that pleasure-seekers from London might assemble in sufficient numbers to return in safety"; and that "men of business settled at Norwood and at Dulwich, when they returned from London after business hours, used to appoint a

[1] Webb, The Parish and the County 245. [2] Ibid 240-241.
[3] Cited, ibid 325, from Parlt. Hist. xxi 592.
[4] Webb, The Parish and the County 326-337; vol. i 146; types are Justice Squeezum who figures in Fielding's play *The Coffee House Politician*, and Justice Thrasher who figures in *Amelia*, see B. M. Jones, Henry Fielding 37-38, 116-117.

place of rendezvous from which they proceeded in a body for mutual protection." [1] No one was safe. On October 6 1774 Horace Walpole wrote that " the day before yesterday we were near losing our Prime Minister, Lord North ; the robbers shot at the postillion, and wounded the latter." Moreover, " the Ladies of the Bed-chamber dare not go to the Queen at Kew in an evening." [2] It is not surprising that, in the middle of the century, the government found it necessary to pay a competent magistrate upon whom it could rely ; and that, at the end of the century, it found it necessary to supersede the Middlesex magistrates by stipendiaries.[3] We shall see that it was for the same reason that in the suburbs many of the functions of government were entrusted to *ad hoc* bodies.[4]

Similarly it was in urban and suburban districts that the need for a police force to assist the justices was first felt. The unpaid constables—the watch—were quite inadequate.[5] Just as the government found it necessary to appoint paid magistrates upon whom it could rely, so it found it necessary to pay a professional body of police. Henry Fielding, who was the London magistrate paid by the government, established a body of professional thief takers, for which the government provided pay.[6] It stopped the epidemic of robberies and murders in 1753 ; [7] and in 1757 it was said that it had almost wholly suppressed street robberies.[8] John Fielding also established, as between London and the county authorities, a system of communicating the names and description of offenders.[9] Just as in 1792 the plan of

[1] Lecky, History of England vii 339 ; for a riot in 1749, which Fielding described in *A True State of the Case of Bosaveron Penley*, see B. M. Jones, op. cit. 135-142 ; for a striking illustration of the inefficiency of the way in which the peace was kept in London see Walpole, Memoirs of George III iii 219-221 ; for a riot of weavers in 1765 which attacked Bedford House see Walpole, Letters (ed. Toynbee) vi 239-240 ; it was said in 1778 that " scarcely a night passed in which there were not robberies committed in Park Lane, and firing of pistols heard," Parlt. Hist. xix 970 ; see ibid xvi 929-943 for a discussion of Sir John Fielding's plan of a better paid system of constables for preventing the frequent burglaries and robberies which took place in London and Westminster.

[2] Letters (ed. Toynbee) ix 63 ; cp. also ibid xii 327-328, 338, 347.

[3] Vol. i 146-147 ; B. M. Jones, op. cit. 241-242 ; 32 George III c. 53 ; the debates in the House of Commons on the statute of 1792 show clearly the necessity for it, Parlt. Hist. xxix 1034, 1467-1469, 1473-1474.

[4] Below 214-219.

[5] Fielding in *Amelia* bk. i c. 2 described " the watch " as " poor old decrepit people who are from want of bodily strength, rendered incapable of getting a livelihood by work " ; they were sometimes charged with being in league with criminals, B. M. Jones, Henry Fielding 145 ; and Blackstone said of the constables, that " considering what manner of men are for the most part put upon these offices," it was as well that they were ignorant of their powers, Comm. i 356 ; for a shocking story of the misdeeds of some drunken constables in 1742 see Walpole's Letters (ed. Toynbee) i 258-259.

[6] B. M. Jones, op. cit. 146-149. [7] Ibid 149-151.

[8] Ibid 154, citing Browne's Estimate i 219.

[9] Calendar of Home Office Papers, 1770-1772, 562-563 ; for an appreciation of John Fielding's work see ibid 1773-1775, xli-xliii.

paying a competent magistrate was extended by the institution of stipendiary magistrates in various London parishes, so in 1802 these justices were empowered to employ not more than eight constables who were to be paid for their services.[1] We have seen that the connection between these stipendiary magistrates and a paid police force was still maintained when Peel established his police force for London in 1829; and that it was not till ten years later that the control of this paid police force passed out of the hands of the stipendiary magistrates.[2]

Amongst the county magistrates there were many different types, good and bad.[3] Probably the good predominated. "The impression," Professor Trevelyan tells us, "left by turning over many hundreds of letters of the better-to-do gentry of the reign of Anne, is neither that of country scholar nor of country bumpkin."[4] They may not have been very learned; but they were honest and public-spirited; and that was sufficient to prevent the country benches from sinking to the level of the Middlesex bench. Moreover, they were ready to recognize learning and industry when they saw it, and to follow the lead given by a justice distinguished for these qualities. There are a succession of clerical justices, such as Richard Burn, whose book on the justice of the peace was long the standard work on the subject.[5] These clerical justices did good work in effecting particular reforms in their districts. Some of them effected reforms in the prisons and houses of correction before Howard had begun his work in this field.[6] Some of the laymen are equally notable. Between 1717 and 1730 Charles Selwyn organized the government of Richmond, Surrey.[7] Bayley, the chairman of quarter sessions in Lancashire in the latter part of the century, supervised the parochial workhouses with diligence, improved the highways of the county by making a practice of presenting those which were out of repair, and worked hard to do justice and keep the peace between the mill-owners and their hands.[8] In Gloucestershire at the same period George Onesphorus Paul, after thirty years of work, was said to have brought the gaol and houses of correction to the highest pitch of perfection then

[1] 42 George III c. 76 §§ 16 and 17. [2] Vol. i 147.

[3] The Webbs, in The Parish and the County, have classified the various types of rural justice under the following heads: the Justice of Mean Degree, op. cit. 321-326, the Sycophant Justice and the Rural Tyrant, ibid 343-347, the Mouthpiece the Clerk, ibid. 347-350, the Clerical Justice, ibid 350-360, the Leader of the Parish, ibid 360-364, Leaders of the County, ibid 364-373.

[4] Trevelyan, England under Queen Anne i 30-31. On the other hand many were very ignorant; cp. Fielding's account of the deposition drawn up by Justice Frolick in the absence of his clerk, *Joseph Andrews*, bk. iv chap. 5.

[5] Webb, The Parish and the County 354; vol. xii 332-334.

[6] Such as the Rev. George Botts, a Suffolk Justice, and the Rev. John Tindel, an Essex Justice, Webb, The Parish and the County 355.

[7] Ibid 362. [8] Ibid 366-368.

known.[1] The duke of Richmond, the lord lieutenant of Sussex, was stirred up to get new county prisons built at Horsham and Petworth;[2] and in 1830 another lord lieutenant—the duke of Buckingham—made the Buckinghamshire bench abandon the bad system of using the poor rate in aid of wages.[3]

It is obvious that the autonomy of all the organs of local government allowed much scope to particular officials who chose to devote themselves to their duties; and that the presence or absence of public-spirited persons of this kind tended to increase the diversity between the conduct of the local government in different places. Though this diversity had bad results in that it made the system very complicated, and prolonged the life of all sorts of survivals, yet it had good results in that it taught citizens the lesson that they will suffer many inconveniences if they acquiesce in the retention of slack or incompetent rulers. There were then no paid experts or skilled bureaucrats to cover decently the defects of the responsible officials. It can hardly be doubted that it was for this reason that, in town and country alike, the oligarchic and aristocratic rule of a few men of fortune and education was preferred to the democratic rule of many; and that where, as in London and other suburban districts, government broke down, because the few entrusted with the government were not men of fortune and education, the device was resorted to of creating statutory *ad hoc* bodies.[4]

We shall now see that the survival of this very mediæval diversity in the organs of local government was accompanied by the survival of much mediæval machinery.

(2) *The survival of mediæval machinery.*

The survival of mediæval machinery is apparent in three well-marked characteristics of the local government of the eighteenth century. First, in the use made of the machinery of presentment; secondly, in the wide and undifferentiated powers exercised by the various organs of local government; and, thirdly, in the use made of unpaid and compulsory service.

The use made of the machinery of presentment.

We have seen that the quarter sessions took over from the Justices in Eyre the machinery of presentment and indictment, and used it, as the Justices in Eyre had used it, not only for the purpose of criminal procedure, but also as an essential part of the machinery of local government.[5] All through the eighteenth

[1] Webb, The Parish and the County 368-369.
[2] Ibid 370.
[3] Ibid.
[4] Below 214-219.
[5] Vol. iv 135-136, 142-144; above 131.

century many of the duties, which the law placed upon the officials and the communities responsible for the conduct of the local government, were enforced by this machinery. Let us look at one or two illustrations of its extensive use.

That it was by this machinery that the duties imposed by law on officials and communities were habitually enforced is shown by the various complaints against constables, occasionally against coroners, and even against the justices themselves. The following is a presentment of a Derbyshire high constable in 1693 : [1]

The presentment of Ad. Bagshaw High Constable of High Peake at ye General Quarter Sessions held at Chesterfield ye 3rd of October 1693. I doe present Samuel Nuthall constable of Youlgreave for not putting in a presentment at this sessions. I doe also present ye said Sam Nuthall for not paying in two pounds for his part of ye warrant of last sessions for Bridges. I doe present ye Inhabitants of ye town-ship of Youlgreave for not having a Constable serve ye office for three months last past. By me Ad. Bagshaw, High Constable.

In 1697 the Eessx grand jury presented one of the county coroners for vexing a jury because it did not find a verdict in accordance with his directions, and also seven justices of the peace for demanding excessive fees for issuing warrants, signing the indentures of apprentices, and confirming the poor rate.[2]

Sometimes these presentments took the form of complaints that particular statutes had not been enforced by the justices and the other officials responsible for seeing to their observance. " In 1700 when royal proclamations had vainly endeavoured to keep down ' the excessive price of corn,' by fulminating against forestalling and regrating, the Essex Grand Jury drew attention to ' the very great neglect of several Constables in this County,' and incidentally to the remissness of the justices themselves in not making arrangements to insist on the licensing, according to law, of ' badgers, jobbers, and drovers.' This led Quarter Sessions to sit by adjournment in all the Divisions of the county,

[1] Cox, Three Centuries of Derbyshire Annals 198 ; cp. the following presentment of Shropshire constables in 1725, Shropshire County Records, Quarter Sessions Rolls, 1696-1800 at pp. 2-3 : " Presentment by Constable of Bradford Hundred. Same against Constable of Strickley for not returning presentment by Constable of Burwarton for *a Salt* and battery. Presentment of High Constable Parslow Hundred, ' By information Thomas Collins of Township of Colebach, is a common night walker, and for a common night walker I present him, and I present him for other misdemeanours, Samuel Matthews.' Presentment by Constable of Bucknell, selling ale without licence, and keeping a dunghill on the highway. Presentment by Constable of Church Stretton for selling ale without licence, another against one who follows the trade of butcher without being apprenticed to it, another by a Constable against a man who had ' abused him with insufferable words which can be invented, as a profane curser and swearer ' " ; for other instances see Webb, The Parish and the County 463-473.

[2] Ibid 453.

so that the persons concerned might the more conveniently take out licences."[1] In 1744 the grand jury of Northumberland, finding that the salutary law for the prevention of the excessive increase of horse races had not been put in force, and that the practice of cockfighting tended to the encouragement of idleness, presented all the contrivers and promoters of these illegal practices, and ordered the clerk of the peace to prosecute them.[2]

The most important class of cases to which this procedure was applied was the class of cases concerned with the maintenance of roads, bridges, gaols, and other county buildings. Inhabitants were presented for not repairing their highways;[3] counties were presented for not repairing bridges, gaols, or houses of correction;[4] and disputes between different districts were fought out in proceedings initiated in this manner.[5] So normal was this procedure in these cases that it was approved and encouraged by the Legislature. In 1739 it was enacted that no money was to be spent on the repair of bridges, gaols, prisons, or houses of correction without a presentment of the grand jury at the assizes or at quarter sessions.[6] The Act was extended to shire halls in 1768; but it was modified to the extent of allowing sudden repairs up to £30 to be ordered by two justices;[7] and in 1812 ordinary repairs up to £20 were allowed to be effected without a presentment.[8] The Act of 1739 was strictly enforced. In 1748 the Derbyshire bench disallowed orders for payment for the repair of the house of correction at Tideswell, amounting to

[1] Webb, The Parish and the County 454. [2] Ibid.

[3] "I present the Inhabitants of ye Parish of Chesterfield for not repayring of ye hyhways leading betwixt Wingerworth and ye towne of Chesterfield, and being within ye sayd Parish Jo Spateman," Cox, Three Centuries of Derbyshire Annals ii 228 (1656); "The Treasurer to pay Mr. David Burton £5 : 18 : 4 expenses in prosecuting the inhabitants of Kirkleavington for not repairing their highways at the Assizes pursuant to the order of the Justices," J. C. Atkinson, North Riding Quarter Sessions Records viii 239 (1742); Shropshire County Records, Quarter Sessions Rolls (1696-1800) 52—presentments in 1777 against two townships.

[4] In 1697 we find the following presentment in the Orders of the Shropshire Quarter Sessions at p. 167: "The Grand Jury at the Epiphany Sessions presented that the Shropshire part of Chirk bridge was out of repair, and was repairable by the inhabitants of the county. Now, no one appearing on behalf of the inhabitants to defend this presentment it is ordered that £90 be raised on the County . . . and be paid to Thomas Edwardes who is to lay it out in repairing the bridge"; above 133-134.

[5] J. G. Atkinson, North Riding Quarter Sessions Records viii 257 (1746), "West Riding thinks that North Riding should repair the north part of the north bridge over the Yon at Ripon, and order indictment at next Assizes if they don't. Court thinks all the bridge should be repaired by West Riding, and resolve to defend any indictment."

[6] 12 George II c. 29 § 13; the strictness of the Act was criticized by Burn, History of the Poor Laws 246 (cited Webb, The Parish and the County 451), who thought that in cases of emergency or small expense the surveyors should have power to act, "lest before the Assizes or Sessions the breach be made worse or the bridge broken down."

[7] 9 George III c. 20 §§ 1 and 3. [8] 52 George III c. 110 § 1.

£144 1s. 6d., because the work had been done without the presentment of a jury.[1]

Moreover, this machinery was used to compel not only officials and communities, but also private citizens, to fulfil their common law or statutory duties. Many of the duties imposed by the common law on all citizens were enforced by presenting offenders for the commission of a nuisance—landowners, for instance, were presented for not cleaning their ditches, or for shooting dung or rubbish on the highway.[2]

This machinery of presentment, of which so much use was made, had three good results. In the first place, it emphasized what was, as we shall see, the one effective check upon these autonomous organs of local government—the control of the law.[3] In the second place, it gave the inhabitants of the county, who were chosen to serve on the grand jury, an opportunity of expressing their views upon the conduct of the local government; and therefore it was a check upon the autocratic power of the justices. In the third place, it made for economy, in so far as it restricted the spending power of officials. But though the use of this machinery had these three advantages, it was accompanied by serious disadvantages. In the first place, the action of the grand jury was spasmodic and casual. But for the repair of buildings a constant supervision is needed, and a power to take timely steps to prevent a building from falling into decay. The procedure sanctioned by the Legislature often meant a policy which was "penny wise and pound foolish."[4] In the second place, though this procedure may have sufficed for a primitive mediæval society, when the local communities were small, poor, and separate, it was not sufficient for the needs of the more complex society of the eighteenth century, when the communities had become more populous, richer, and more closely linked to one another. It is for this reason that, though the mediæval procedure was retained right down to the nineteenth century, it was to some extent adapted to the new conditions.

We have seen that, as early as the end of the sixteenth century, the business of presentment was passing from the inhabitants of townships and parishes into the hands of the high

[1] Cox, Three Centuries of Derbyshire Annals i 117.

[2] Above 147 n. 1; as the Webbs say, The Parish and the County 463-464, "this head of public nuisance comprised an extensive field—in fact nearly the whole of the local government services of the time. . . . To this wide range of public nuisances we may add . . . the offences of the nature of national nuisances, such as sedition, recusancy, disaffection to the dynasty, blasphemy, disorderly drunkenness, and public gambling. Hence in the charges of Chairmen of Quarter Sessions, and in the innumerable handbooks reciting the duties of parish officers, we see a constant emphasis laid on the obligation of Constables to make presentment to Quarter Sessions as well as to the Assizes of all such delinquencies."

[3] Below 243-254.

[4] Above 148 n. 6.

constables of hundreds, who made their own presentments, and stirred up the petty constables to make presentments.[1] As the Webbs have said, "the innumerable tattered dirty and half illegible scraps of paper—a mere remnant surviving out of the mass of presentments of petty constables—yield in their picturesque diversity a graphic portrait of the village life of the beginning of the eighteenth century";[2] and the same thing can be said equally truly of the presentments of the high constables. Obviously the duty of presentment was more likely to be an efficient means of enforcing the law when it was entrusted to the officials of the smaller units of local government than when it was left to the inhabitants at large. This modified system of presentment by the high and petty constables was in full force at the beginning of the eighteenth century. But it came to be more and more neglected by the constables as the century advanced; and, in spite of the protests of quarter sessions, the presentments came to be little more than statements that all is well, or "general printed negations of having anything to present."[3] Nevertheless this modified system of presentment by high and petty constables lasted till 1827, when it was abolished by a statute passed in that year.[4]

A better device for obviating some of the defects of this machinery of presentment was the device of allowing a justice of the peace,[5] or even a constable,[6] to present on his own view.[7] This gave active justices the chance to initiate proceedings to enforce upon communities and persons their common law or statutory duties. Its value was recognized by the Legislature in 1773,[8] when it was enacted that a justice of the peace could

[1] Vol. iv 144-145.

[2] The Parish and the County 469. Cox, Three Centuries of Derbyshire Annals i 111-112, says of these presentments: "They differ in style in a remarkable degree, some constables obtaining the assistance of a legal or educated pen in drawing up their presentments, and others making great efforts after correct phraseology; but the most amusing are the illiterates, or those who, for the sake of brevity, bring the most divers subjects with the closest juxtaposition. A presentment by William Newsome, constable of Glossop, delivered at Quarter Sessions held at Chesterfield on Oct. 8, 1689, is worth preserving; he reports: 'I have no popeish recusantes nor gray houndes nor quakers nor guns to ye best of my knowledge within my liberty'."

[3] Webb, The Parish and the County 470-473.

[4] 7, 8 George IV c. 38; as the Webbs point out, The Parish and the County 473, it was abolished "without the provision of any substitute for the ancient supervision of the county organisation."

[5] Cox, Three Centuries of Derbyshire Annals ii 228; Shropshire County Records, Quarter Sessions Rolls (1696-1800) 5 (1734), "Presentment by Thomas Langley Esq. J.P. that a certain highway in the parish of Barrington, leading from Curd to Eaton Mascott is ruinous etc., and should be repaired by the parish of Berrington. Another by the same Justice as to the highway between Cross Houses and Atcham, that it is ruinous etc., and should be repaired by Atcham."

[6] "Presentment by constable of Stonebridge of Pont Vain for being out of repair," ibid 52 (1777); Cox, Three Centuries of Derbyshire Annals i 98.

[7] Webb, The Parish and the County 474-479. [8] 13 George III c. 78 § 24.

upon his own view, or on information on oath given by the surveyor of highways, present highways, causeways, or bridges for want of repair, or for any default contrary to the Act. It was also provided that, on the view of two or more justices, a highway could be widened,[1] or a bridleway or footway diverted.[2] Considerable use was made by the justices of this device in order to improve the roads and bridges, to call attention to the state of workhouses, and to abate other nuisances.[3] On the conviction of the delinquent parish or person the fine was often spent upon remedying the default under the direction of the presenting justice.[4] This is the last stage of this mediæval machinery. As the Webbs say,[5] "the expenditure of public money under the direction of the justice himself had become the substance of the device—the clerk of the peace, whenever a bridge needed repair, making out a presentment in the name of some complacent magistrate . . . who was then deputed to superintend the work." The use of the machinery of presentment to enforce duties to repair highways was abolished in 1835.[6]

The wide and undifferentiated powers exercised by the various organs of local government.

The mediæval machinery of presentment takes us back to the days when the functions of government were undifferentiated. The mediæval courts of many different communities had wide powers both of making regulations for the members of the community, and of punishing the breach either of these regulations, or of the rules of the statute or common law.[7] These powers were inherited by the autonomous organs of local government in the eighteenth century. They not only punished offences, they also made administrative orders and regulations which were legislative in character.[8]

The quarter sessions was a court; and, like the courts of common law, it made rules which regulated its own procedure.[9] But procedural rules and the rules of substantive law have a habit of shading off into one another; and some of these procedural rules made changes of substance. Thus quarter sessions sometimes limited the powers of individual justices or pairs of justices.

In 1701, we see the Kent quarter sessions peremptorily ordering that "all warrants and orders made by justices in any part of the country as to settlements shall be null and void . . . unless made after

[1] § 16. [2] § 19. [3] Webb, The Parish and the County 476-478.
[4] Ibid 478. [5] Ibid 479. [6] 5, 6 William IV c. 50 § 99.
[7] Vol. ii 378, 391; vol. iv 129, 136, 158. [8] Below 234-235.
[9] See Shropshire County Records, Orders of Quarter Sessions (1782-1839) 81-83, for a collection of orders regulating procedure; below 225-227.

all parties concerned be legally summoned to be heard. In the West Riding of Yorkshire, quarter sessions actually anticipated by a whole generation the action of Parliament in creating, by its own fiat in 1692, what afterwards became known as Brewster Sessions.[1]

The wide powers of the justices to provide for the peace and order of their districts, coupled with the increase of these powers by statute, enabled them, and indeed almost compelled them, to lay down rules as to many matters which fell within their jurisdiction. Their common law powers enabled them to suppress hawkers, to suppress or regulate wakes or fairs,[2] and, under cover of putting down nuisances, to suppress any kind of conduct of which they disapproved.[3] Thus the Middlesex quarter sessions issued many general orders "prohibiting one objectionable practice after another until Parliament relieved them from their thankless task by embodying their general orders in the clauses of innumerable local Acts, giving to the Select Vestries, or to the Paving and Lighting Commissioners of the London Parishes, statutory powers to suppress all such specified offences against public convenience or health."[4] In the orders issued by the justices in the course of their exercise of their statutory powers, we see the beginning of the laws as to such matters as licensing,[5] rating,[6] and poor relief.[7] And some of these orders had a more than local operation. One bench of justices would adopt orders made by another.[8] During the last decade of the eighteenth century many benches adopted similar rules as to the conditions under which they would licence public houses;[9] and in 1795 the resolutions of the Berkshire justices at Speenhamland, as to the administration of the poor law, were followed in many counties, and acquired almost the force of an Act of Parliament.[10] And the justices could see that their orders were obeyed; for they were not only the law makers, but the tribunal which adjudicated on the breach of their laws. The only control to which they were subject was the control of the courts of common law, if and when an individual was rich or litigious enough to call their acts in question.[11]

[1] Webb, The Parish and the County 539-540. [2] Ibid 536-537.
[3] Ibid 538. [4] Ibid. [5] Below 186-187.
[6] Below 169. [7] Below 173.
[8] In 1703 the Shropshire Quarter Sessions directed that an order of the Bedford Quarter Sessions as to the Queen's proclamation against vice should be made an order of the court, Shropshire County Records, Orders of Quarter Sessions (1638-1705) 207.
[9] Webb, The Parish and the County 542-544; below 186.
[10] Webb, The Parish and the County 545-548; below 176.
[11] "As compared with analogous discretional regulations by the local authorities of to-day we notice two important constitutional differences. The Justices between the Revolution and the Municipal Corporations Act enjoyed in all these regulations a complete and unshackled autonomy. Unlike a modern County Council making by-laws, Quarter Sessions was under no obligation to submit its orders for confirmation to the Home Secretary, or to any other authority. More-

What was done by the quarter sessions was done also by inferior organs of local government; for all alike had inherited the indefinite powers of the mediæval community. In many parishes we see an autonomous community regulating its communal life after its own fashion. With the assent of the inhabitants or a major part thereof,

there seems to have been no limit to the changes in law or custom which a parish vestry felt itself free to effect. . . . It would peremptorily suppress any ancient local custom of which it disapproved—ordering, for instance, "that no inhabitant, licensed or unlicensed, or any other person shall appoint horse racing, cudgel-play, or any other unlawful gaming." For litigation it had an unlimited capacity. It would resolve, with equal alacrity, to pay out of the rate for the prosecution of men who deserted their families or of women guilty of stealing wood; of burglars and of those guilty of the heinous crime of Sunday fishing. . . . It would set itself to suppress a plague of caterpillars . . . or a swarm of mad dogs. What is more remarkable it would even change the area of the parish, or alter the legal incidence of local burdens, not for one year only but for all time. Thus the vestries of Tooting and Streatham, in 1808, in connection with beating the bounds of their respective parishes, formally agreed by resolutions to exchange certain strips of land and groups of houses, with apparently no thought that this matter concerned anyone but themselves.[1]

The use made of unpaid and compulsory service.

As in the Middle Ages, all the tasks of local government were performed by the inhabitants of counties, boroughs, hundreds, and parishes, who were unpaid, and who were, in most cases, compelled by law to undertake very onerous duties.

It is true that certain of the officials of the local government were paid indirectly by fees exacted for certain activities—the clerk of the peace, sheriffs, the justices of the peace in respect of some of their activities, and the coroners, were paid in this way.[2] It is true that the justices of the peace had originally been paid wages—though these wages had come, long before the eighteenth century, to be a nominal sum which was not exacted.[3] But, subject to these modifications, the service of all citizens called upon to take a part in administering the local government was in theory gratuitous. Jury-men, overseers of the poor, surveyors of the highways, high and petty constables—all must serve gratuitously.[4] In 1785 Lord Mansfield held that it was

over, the Justices were not only the law makers, but, either collectively or individually, themselves also the tribunal to adjudicate on any breaches of the regulations," Webb, The Parish and the County 535.

[1] Ibid 52-53.

[2] Vol. iv 150; Webb, The Parish and the County 304-305; in 1716 there was legislation as to the fees payable to and by the sheriffs, 3 George I cc. 15 and 16.

[3] Webb, op. cit. 423 n. 1; vol. i 289.

[4] In the case of some of these offices women as well as men must serve, e.g. the offices of overseer, constable, and sexton, see R. v. Stubbs (1788) 2 T.R. at p. 406 *per* Ashurst J.

definitely illegal to pay a person to act as an assistant overseer; and he refused to allow the overseers to credit themselves with a sum paid for this purpose, although the payment had been sanctioned by the majority of those present at a vestry meeting. "It is very hard," he said, "especially on the officers who have paid the money, but I cannot make it a legal act. It is a great burden, but the statute meant to throw it on the overseers, and that they should do it without fee or reward." [1]

Many of these officers were compelled to serve when they were appointed. It is true that the justices of the peace could evade their duties by failing to "take out their Dedimus Potestatem"; and complaints were sometimes made that justices failed to qualify themselves to act by taking this necessary step.[2] It is true that there was no compulsion to take the offices of lord lieutenant, custos rotulorum, or coroner; [3] but there was compulsion to take the office of sheriff,[4] and to take the lower offices of the parish and hundred, such as the office of high and petty constable, overseer, and surveyor of highways.[5] In 1714 Defoe described the obligation to take the office of constable as "an insupportable hardshipp"; [6] and this was also true of the other unpaid parish offices, more especially in the urban districts which were rapidly springing up in the latter part of the eighteenth century.

Moreover, besides the obligation to serve in these unpaid offices, and besides the obligation to serve on juries, a statute of 1555 placed upon the inhabitants of the parish the duty of maintaining the roads—thus putting the parish in the place of the older communities of manor, township, or hundred.[7] Owners of land to the value of £50 a year, and persons keeping plough horses must provide a cart and horse and two men for work on the roads, and cottagers and labourers must work themselves on the roads or send a substitute. They must do this work on the date fixed by the surveyor for eight hours a day on six consecutive days.[8] We shall see that at the end of the seventeenth, and all through the eighteenth century, the inadequacy of this method of maintaining the roads was growing more and more apparent, and that various devices for supplementing its deficiencies were adopted; [9] but the legal liability to furnish this

[1] The King v. Welch (1785) 4 Dougl. 236; this hardship was remedied by 59 George III c. 12 § 7, which empowered the vestry to appoint and pay assistant overseers; but overseers were still obliged to serve gratuitously, R. v. Glyde (1813) 2 M. and S. 323 (n.).

[2] Webb, The Parish and the County 321, 407, 583 n. 2.

[3] Ibid 303.

[4] Ibid 304.

[5] Ibid 16, 29; Webb, The Story of the King's Highway 15.

[6] The Parish and the County 62.

[7] Vol. iv 156; Webb, The Story of the King's Highway 28; below 171.

[8] The Story of the King's Highway 15.

[9] Below 171-172, 207-210.

"statute labour," as it was called, continued to be in theory an obligation resting upon all the inhabitants of the parish till an Act of 1835.[1] Even in that Act ratepayers with teams could, if this course was sanctioned by a meeting of the vestry, perform carrying work at piecework rates to be fixed by the justices, instead of paying the highway rate to which they were liable [2]— so persistent has been the survival of this very mediæval method of road maintenance.[3] Moreover, in addition to the liability of the inhabitants at large to maintain roads, the law still recognizes the liabilities, which were recognised in the Middle Ages, of persons or corporations *ratione tenurae*, *ratione clausurae*, or by prescription.[4]

(3) *The judicial control of the organs of local government.*

Of all the many survivals of mediæval ideas, which are so striking a feature of the English system of local government, this system of judicial control is the most striking. We have seen that, from the earliest days of the common law, the chief check upon the autonomy of the organs of local government had been the control exercised by the King's judges, either by means of the machinery of presentment and indictment, or by means of the prerogative writs; and that in the days of Edward I the self-government of autonomous communities, subject to the rule of law, was a well-marked characteristic of the English system of local government.[5] We have seen also that, just as the King's justices controlled all the officials and communities responsible for the conduct of the local government by the machinery of presentment and indictment, so the sheriffs in their tourns, and the lords in their leets controlled the humbler officials and communities by a similar machinery.[6] We have seen that this machinery of control was applied from the first to the new organization of local government under the justices of the peace. The courts of common law and the itinerant justices continued to control all the organs of local government by the machinery of indictment and presentment. The court of King's Bench continued to order them to perform their duties by writs of mandamus, or to call up cases heard by them by writs of certiorari, or to prevent them from exceeding their jurisdiction by writs of prohibition.[7] Similarly the justices in their quarter sessions controlled the parish and its officials, in the same way as, in the Middle Ages, the townships and hundreds and their officials had been controlled by the tourn or the leet.[8]

[1] 5, 6 William IV c. 50.
[2] § 35.
[3] Webb, The Story of the King's Highway 229.
[4] Below 311-313.
[5] Vol. ii 396-400, 404-405.
[6] Vol. i 78-81, 135-137.
[7] Ibid 297; vol. iv 164, 188.
[8] Ibid 162-163, 164.

In the Tudor and early Stuart period there were signs that this judicial control might be superseded by the administrative control of the Council, the Star Chamber, and the Provincial Councils ;[1] and the control exercised by the judges of assize was at that period administrative as well as judicial.[2] But the result of the Great Rebellion and the Revolution had been to abolish this administrative control, and to make the system of judicial control in effect the only control to which the organs of local government were subject. The only way in which the justices could be forced to perform their duties, and the only way in which they could force the subordinate officials and units of local government to perform their duties, was by taking proceedings before the courts of law.[3] Hence, during the eighteenth century, this judicial control of all the organs of local government is elaborated ;[4] and this elaboration is, as we shall see, the reason why special bodies of law connected with local government begin to be developed.[5]

The manner in which this judicial control was exercised can be grouped under three main heads :—

(i) There is the control which is exercised by proceedings initiated in the name of the Crown. All through the eighteenth century the duties of townships and parishes in relation to such matters as road maintenance and poor relief ; the duties of constables, surveyors of highways, and overseers ; the many duties imposed upon the justices and upon quarter sessions by the common law and by statute, were enforced either by the machinery of presentment and indictment, or by means of a criminal information, or by means of the prerogative writs.[6] Even the departments of the central government, though they might advise, could not compel, except through the machinery of the courts. Thus when the county of Derby failed to comply with the militia Acts of 1757,[7] 1765,[8] and 1769,[9] the government was obliged to issue a writ of mandamus against the justices to compel them either to raise their statutory quota of 560 men, or pay £5 per man. On the issue of this writ the justices ordered the sum of £2,800 to be raised ; but nothing was done till another mandamus was threatened in 1773.[10] Hence the departments of the central government, like the private citizen, could only compel if they could show that an official or a community was subject to a legal duty, and that he or it had not fulfilled that duty.

[1] Vol. iv 72-80 ; vol. vi 56-57.
[2] Vol. iv 75-76 ; vol. vi 57-58.
[3] Above 133, 155.
[4] Below 243-254.
[5] Below 256 seqq.
[6] Below 244.
[7] 30 George II c. 25.
[8] 5 George III c. 36.
[9] 9 George III c. 42.
[10] Cox, Three Centuries of Derbyshire Annals i 184-189.

(ii) This judicial control could be applied at the suit of the private citizen. The private citizen could set in motion the different forms of procedure open to the Crown, and, in addition, he could bring a civil action. This power to bring a civil action was an effective control, a safeguard of the liberty of the subject, and one of the best of all the securities for the maintenance of the supremacy of the law.

Since breaches of the law, arising either from misfeasance or non-feasance, were generally a cause of action at the suit of the individual injured by them, civil proceedings could be taken against all the officials of the local government by persons who had been injured by negligent or wilful breaches of the law committed by them. This responsibility of the officials of the local government to the law, at the suit of an injured individual, had been a well-recognized principle of the mediæval common law ; [1] and we have seen that, as the result of the Great Rebellion and the Revolution, it had been extended to all servants of the Crown from the highest to the lowest.[2] The formality of the common law procedure, and the strictness of the rules of pleading sometimes caused this rule to press hardly on officials. To some extent this hardship was remedied by the Legislature. A series of one hundred and eight statutes, beginning with the Poor Relief Act of 1601 and extending to the Inland Revenue Regulation Act of 1890, contain clauses which gave procedural advantages to justices of the peace and other public authorities.[3] They could plead the general issue,[4] a short period of limitation was provided,[5] they were given double and sometimes treble costs if judgment was given for them,[6] special notice of the proceedings must be given to them,[7] if they tendered sufficient amends judgment was to be given for them.[8] This long series of statutes was repealed, and a general provision was made by the Public Authorities Protection Act 1893.[9] In spite of the procedural advantages conferred by these statutes, this liability of the officials of the local government to be sued by aggrieved persons may, in some cases, have pressed hardly upon them. But it was a valuable check upon the arbitrary exercise of their powers in an age in which judicial control was the only effective check to which they were subject.

(iii) It often happened that a dispute arose between different units of the local government—between parishes or between

[1] Vol. ii 449. [2] Vol. vi 101-103, 111, 215, 267.
[3] All these clauses are set out and repealed in the Schedule to the Public Authorities Protection Act 1893, 56, 57 Victoria c. 61.
[4] E.g. 7 James I c. 5. [5] E.g. 19 George II c. 21 § 11.
[6] E.g. 8, 9 William IV c. 27 § 17 ; 15 George II c. 20 § 10.
[7] E.g. 24 George II c. 44 § 1 ; 10 George III c. 47 § 7.
[8] E.g. 24 George II c. 44 § 2. [9] 56, 57 Victoria c. 61.

counties—as to the incidence of the liability for the performance of their duties. A dispute, for instance, might arise between two parishes as to which of the two was liable to relieve a pauper, or as to which of the two was liable to maintain a road. All these disputes were settled by an appeal to the courts; and we shall see that much of the law upon such subjects as poor relief and highways originated in the decisions of the courts in these cases.[1]

This mediæval idea that the organs of local government were autonomous, subject only to the control of the law, was and still is a leading principle of English public law. It was applied in the eighteenth and nineteenth centuries much as it was applied in the Middle Ages and in the sixteenth and seventeenth centuries. It is true that in the nineteenth century we can see the growth of an administrative control by departments of the central government, which recalls the control which the Council and Star Chamber had begun to exercise in the sixteenth and early seventeenth centuries. But, except in so far as statutes have transferred this control to departments of the central government, this judicial control is still dominant. Since therefore this particular mediæval idea is as much a part of the public law of the eighteenth century as of earlier centuries, I shall deal with its bearings upon the public law of the eighteenth century when I speak of the relation of local to the central government. But, before I can deal with that topic, it is necessary to consider the manner in which the system of local government of the sixteenth and seventeenth centuries was modified to suit the needs of the eighteenth century. With these modifications I shall deal in the following section.

The Growth of Modern Ideas

The autonomy of the organs of local government, subject always to the control of the law, was as much the outstanding characteristic of English local government in the eighteenth century as it had been in the Middle Ages. But we have seen that, in the fourteenth and fifteenth centuries, it had been recognized that the law which controlled the activities of all persons, whether officials or not, and of all communities and corporations, was a law which could be changed and added to by Parliament.[2] The legislation of the Tudor period had built up on mediæval foundations a system of local government which sufficed for the needs of a modern state. Similarly the legislation of the eighteenth century attempted, not wholly unsuccessfully, to adapt that system to the needs of that century. This

[1] Below 257-258, 311. [2] Vol. ii 441-443; vol. iv 184-187.

legislation took three main forms: in the first place, general Acts modified and added to the existing system. In the second place, local Acts gave special powers to the organs of local government in particular places in order to enable them to meet their local needs. In the third place, other local Acts constituted *ad hoc* bodies to perform functions which could not be satisfactorily performed by the existing local authorities. This legislation, whether general or local, in no way curtailed the autonomy of the organs of local government which were regulated or created by it. They retained their powers of enforcing the law, enacted and unenacted, and of putting into execution the powers given to them by the Legislature, in the manner which seemed to them to be best adapted to attain the objects aimed at by the law. And so, side by side with the legislation, which in this century was introducing modern ideas into the system of local government, we get the growth of new machinery, devised mainly by these autonomous units of local government, in order to give effect to these modern ideas. In the local, as in the central government, the pressure of new needs united with the large autonomy allowed by the law to officials trusted with its conduct, to cause the growth of conventional practices, which not only supplied the machinery necessary to give effect to modern ideas, but also made important additions to the law.

Thus this topic—the growth of modern ideas in the local government of the eighteenth century—falls naturally under three heads: first, general and local legislation; secondly, the legislation which created *ad hoc* authorities; and, thirdly, the adaptation of old machinery to new conditions.

(1) *General and Local Legislation.*

We have seen that the stream of statutes, which gave to the justices of the peace their position of decisive importance in the government of the counties and the boroughs, had begun to flow in the Tudor period.[1] That stream increased in volume right down to the nineteenth century. It not only added to and elaborated the duties imposed on the justices in or out of sessions, but it also added to and elaborated the duties imposed on many of the minor officials of the local government, such as constables, overseers, and surveyors of highways. Throughout the eighteenth century, the working and interpretation of these statutes by single justices or pairs of justices, under the supervision of quarter sessions and the courts of common law, was creating much new law and elaborating much old law on many

[1] Vol. iv 137 seqq.

different topics, which were more or less closely related to the topic of local government.

The primary duty of the justices was to keep the peace. That always must be the earliest and most permanent duty of officials entrusted with the powers of government, local or central. Therefore there was, from the first, a close connection between local government and the criminal law; and that connection was maintained long after the government had undertaken other tasks besides its primary task of keeping the peace. The many statutes which regulated the activities of citizens, which imposed obligations pecuniary or personal upon them, which organized public services, such as poor relief or road maintenance, necessarily provided for the punishment of those who disobeyed them. Therefore, whilst enlarging the governmental powers of the justices, they, at the same time continually enlarged their criminal jurisdiction. Since the criminal law, both substantive and adjective, had come to be a very technical body of law, the enforcement both of the old common law rules and of the new statute law, was no easy matter. Substantial justice must be done; but if that substantial justice was not done in conformity with the rules of a very technical system, the justices might easily expose themselves to personal liability.[1]

A catalogue of the statutes which enlarged the jurisdiction of the justices, criminal or otherwise, would include a very large proportion of the statutes passed during the eighteenth century.[2] Such a catalogue, however arranged, would be useless, since it would omit the common law rules, substantive and adjective, which those statutes presuppose, and the interpretation put upon these common law and statutory rules by the courts. In fact, from 1618, when Dalton's *Country Justice* was first published, writers upon the justices of the peace found that an alphabetical arrangement, based upon the principal matters falling within the jurisdiction of the justices, was the only possible method by which they could treat their subject. A glance at the alphabetical headings, under which Burn treats of the justices of the peace and the other officials of local government,[3] will give the best idea of the extent and variety of the jurisdiction and the powers which the Legislature had conferred upon them. The headings are as follows:

[1] Below 253-254.

[2] Burn, at the close of the 8th ed. of his book on the justices of the peace, complains of the confused state of the statute law, and advocates measures of consolidation in order to simplify it; for the reasons for this confusion see vol. xi 371-377.

[3] The Justices of the Peace and Parish Officer (8th ed. 1764).

Accessory
Addition
Affray
Alehouses
Annuities
Appeals
Apples and Pears
Apprentices
Approver
Arraignment
Arrest
Assault and Battery
Assizes
Attachment
Attainder
Attaint
Attorney
Award

Badgers
Bail
Bankrupt
Banks destroying
Barratry
Bastards
Bent [1]
Bigamy
Black Act
Black Lead
Blasphemy and Profaneness
Books
Bread
Bribery
Bridges
Buggery
Burglary
Burning
Butchers
Butter and Cheese
Buttons
Buying of Titles

Cambrick
Carriers
Cattle
Certiorari
Cheat
Church and Churchyard
Churchwardens
Clergy
Clerk of the Peace
Coals and Coalpits
Coin
Commitment
Common prayer
Confession
Conspiracy
Constable
Conviction
Corn
Coroner
Cottage
County Court
County Rate
Custos Rotulorum

Debtors
Demurrer
Deodand
Dissenters
Distress

Escape
Estray
Estreat
Evidence
Examination
Excise and Customs [2]
Execution
Extortion

Fast Days
Felony, Misprision of Felony and Theft bote
Fire in London
Fireworks
Forcible Entry and Detainer
Foreign Service
Forestalling, Ingrossing, and Regrating
Forfeiture
Forgery
Fuel

Game [3]
Gaming
Gaol and Gaoler
Gunpowder

Hackney Coaches and Chairs
Hawkers and Pedlars
Hay
Hemp
Herring Fishery
Highways [4]
Homicide
Horses
House of Correction
Hue and Cry
Hundred

Indictment
Infants
Information
Inrollment

Judgment
Jurors
Justices of the Peace

Land Tax
Larceny
Leather
Lecturer
Leet
Letter
Lewdness
Libel
Linen Cloth
London
Lord's Day
Lunaticks

Madder
Maim
Maintenance
Marriage
Militia [5]
Miller
Misdemeanor
Mute

Northern Borders
Nuisance

[1] This enigmatical heading refers to a statute of 15 George II c. 33 § 6 which made it a criminal offence to pluck up bent—a sort of rush which held together the sandhills on the north-west coast of England, especially in the county of Lancaster, and so prevented inundations of the sea.

[2] A title of 111 pages.
[3] A title of 82 pages.
[4] A title of 41 pages.
[5] A title of 51 pages.

Oaths
Office

Pardon
Parliament
Partition
Peers
Perjury and Subornation
Petition
Pewter and other Metals
Physicians
Pillory and Tumbrel
Plague
Players
Polygamy
Poor [1]
Popery
Post
Praemunire
Presentment
Prison breaking
Process
Prophecies
Public Worship
Purveyors

Quakers

Rape
Recognisance
Rescue
Restitution of Stolen Goods
Riot, Rout and Unlawful Assembly
Rivers and Navigation
Robbery

Sail cloth
Sanctuary
Scavengers
Schoolmasters
Seamen
Search Warrant
Servants
Sessions
Sheriff
Ships
Shoemakers
Silks
Slander
Soldiers
Stamps
Stock of Companies
Stocks
Stores
Surety for the Peace

Surety for good Behaviour
Swearing

Thames
Tiles
Tithes
Tobacco
Torn
Transportation
Traverse
Treason
Treasure found
Treasurer
Turnips

Vagrants

Warrant
Watch
Weights and Measures
Wife
Windows
Wine
Witchcraft
Women
Wood
Woollen manufacture
Wreck

A perusal of these headings tells us something of the development of the system of local government in the eighteenth century.

In the first place, we are struck by the very numerous branches of the law with which the justices were brought into contact. Besides the whole body of the criminal law, statutory and otherwise, and besides the various topics of local government law, the justices were brought into contact with the law relating to the revenue (*Excise and Customs*, *Land Tax*, *Stamps*); with the law relating to many various trades; with commercial law (*Bankrupt*, *Stock of Companies*); with the military forces of the Crown (*Militia*, *Soldiers*); with the marriage laws; with many aspects of the laws relating to religion (*Church and Churchyard*, *Common Prayer*, *Dissenters*, *Lord's Day*, *Popery*, *Publick Worship*); with the law of real property (*Inrollment*, *Tithes*); with the law as to infants and married women (*Infants*, *Wife*); with the food supply and prices (*Bread*, *Corn*, *Fuel*); with the law of master and servant (*Servants*); with the law as to seamen and ships; and with a large part of the law as to evidence and procedure. It is

[1] The longest title—130 pages; in the 23rd ed., 1820, it occupies one out of five volumes.

obvious that the multiplicity of the duties which the Legislature heaped upon the justices prevented them from being as efficient as they might have been in the sphere of local government. This difficulty was not so much felt in the rural districts, where life was simple and slow and followed a customary routine. It was felt in the urban districts, which were rapidly springing up at the end of the century; and we shall see that the justices in those districts, assisted by the Legislature, used their large discretionary powers to adapt the old machinery to the new conditions.[1] But, though the variety of the powers and duties of the justices militated against efficiency in the sphere of local government, it had a compensating advantage. It gave the justices a practical acquaintance with many branches of law, public and private; it gave them a comprehensive view of the effect of the working of the law, statutory and otherwise, upon those whom it affected; and it thus enabled them both to make well-considered proposals for legislative changes, and to criticize intelligently proposals made by others. We shall see that in the eighteenth century, as in earlier centuries,[2] this has no small bearing upon the efficiency of Parliament, and especially of the House of Commons;[3] and that it played no small part in enabling Parliament to fill the great position which the Revolution settlement had given to it.[4]

In the second place, the extent of the criminal jurisdiction of the justices was very wide. Their connection with many different branches of the law—with the law, for instance, as to trade regulations, as to food prices, as to the revenue of the Crown, as to master and servant—was a connection based, to a large extent, upon the criminal law. They must punish offences against the statutes which governed these different branches of the law. The same thing is true of many of their powers and duties in relation to local government. Much of the law relating to local government was approached through, and grew up under the shadow of, the criminal law. This method of approach came very naturally to a system which still worked to a large extent through the machinery of presentment and indictment;[5] and it was wholly in accord with the mediæval idea that it was sufficient for the Legislature to impose duties on private persons, officials or communities, and to leave it to the autonomous organs of local government to carry out those duties and to punish those who neglected to do so.[6] A curious and a late instance of the survival of this idea comes from a Parliamentary debate in 1777. Reflections had been cast by a member on the justices for their negligence in allowing unlicensed

[1] Below 223-226. [2] Vol. iv 181. [3] Below 241-242.
[4] Below 335. [5] Above 146-151. [6] Above 151-153.

theatrical performances. To these reflections another member replied that "as a magistrate the honourable gentleman ought to have known that it was no part of a magistrate to act in the first instance, but officially on a complaint made or on information given." [1]

But, in the third place, it had become clear, long before the beginning of the eighteenth century, that this narrow view of the sphere of the duty of the magistrates was obsolete. The Tudor and Stuart legislation on such matters as commerce and industry, rating, highways, the poor law, vagrants, houses of correction and prisons, and liquor licensing, cast upon the justices and other officials of the local government much administrative work, which made it necessary that they should act "in the first instance," and take the initiative in putting the law in force. As the Webbs have said: [2]

> The work of the individual justice was not confined to dealing with such cases as were brought before him. The law enabled, and in some cases positively enjoined, him to go out into the highways and byways to discover cases in which parish officers were neglecting their duties, and to hunt out the crimes and misdemeanours of private persons. . . . Now and again we see magistrates breaking out into what may almost be regarded as a crusade against one or other class of offences. Between 1689 and 1714, for instance, we find them, goaded on by the Societies for the Reformation of Manners, very active in putting down Sunday desecration and gaming houses, profane swearing, and vice and immorality. . . . A more normal form of activity was the rural magistrate's general supervision of the roads and bridges of his neighbourhood.

This view of the duties of the justices, which was the direct consequence of the new position in which they had been placed by the legislation of the sixteenth and seventeenth centuries, introduces ideas as to the conduct of local government which are very different from the mediæval ideas, and creates the need for a machinery of government very different from the mediæval machinery, through which the justices still did much of their work. The prevalence of this view will tend to separate the enforcement of duties upon officials and others through the machinery of the criminal law, from the performance of administrative functions. Its increasing prevalence, all through the eighteenth century, is due to the multiplication of statutes dealing with many aspects of local government, which emphasized the administrative side of the justices' work. Let us look at a few examples of these statutes, general and local.

(i) *General Statutes.*

Of these statutes I propose to take as examples some of those which deal with commerce and industry, rating, highways, the

[1] Parl. Hist. xix 204. [2] The Parish and the County 391-392.

poor, vagrancy, houses of correction and prisons, and liquor licensing. At this point I shall deal with these statutes merely from the point of view of the powers of the justices. Of the specialized departments of law which were growing up around them I shall speak later.[1]

Commerce and Industry.

The powers conferred upon the justices of the peace in relation to commerce and industry, were the earliest of their powers of an administrative kind, which were definitely distinct from those undifferentiated judicial and administrative powers, exercised through the mediæval machinery of presentment and indictment. As early as Henry VI's reign they had been given power to control ordinances made by gilds and other similar bodies ;[2] and the national regulation of all branches of commerce and industry, which is characteristic of the Tudor and early Stuart period, added enormously to their administrative powers in these fields. We have seen that gilds, boroughs, and the justices of the peace were given new powers to regulate very many branches of internal trade ;[3] that they were given large powers in relation to the fixing of the prices of food and other commodities ;[4] and that they were required to fix wages annually at rates which varied with the price of necessaries.[5] In the latter half of the seventeeth century the constitutional changes which had weakened the power of the central government, and the changes in economic theory which were tending to emancipate traders from some of the mediæval and sixteenth-century restrictions upon their trade, were diminishing the control of the justices, the gilds, and the boroughs.[6] Their powers were still large—the justices must see to the enforcement of statutes passed to regulate particular trades,[7] and they had large powers in relation to apprenticeship.[8] But the growth of the capitalistic organization of industry, the influence of these capitalists, and the development of economic theory under their influence, were tending to make the Legislature doubt the wisdom of much of the restrictive legislation of the sixteenth and early seventeenth centuries.[9] The influence of this new point of view can be seen in the fact that both the legislation as to the fixing of prices,[10] and the machinery devised for the fixing of wages,[11] were falling into disuse.

[1] Below 256 seqq.
[2] Vol. ii 467 ; vol. iv 322.
[3] Ibid 321-322.
[4] Ibid 376-377, 378.
[5] Ibid 144, 147, 381-382.
[6] Vol. vi 333-334, 356-360.
[7] Ibid 332.
[8] Vol. iv 341-342 ; vol. vi 321.
[9] Ibid 341, 356-360.
[10] Ibid 346-347, 356 ; below 166, 167 ; vol. xi 466, 468, 469.
[11] Vol. vi 348 ; below 166-167 ; vol. xi 467-468.

In the eighteenth century these tendencies were accentuated, with the result that the duties of the justices of the peace and other local authorities in relation to commerce and industry were both changed and lightened.

In 1772, in a debate on the report of a committee of the House of Commons on the laws relating to the assize of bread, Governor Pownall said : [1]

> He was clearly of opinion it was not within the power of Parliament, nor the reach of any human power, to lower the whole of the price of things as they ran through the community, that is, that it was not within the power of man to alter the proportions which money, and those things which were bought with it, bore to each other ; for that price or proportion depended entirely on the proportional quantity of money ; that a great influx of money made money cheap, and of course, what in common language is called, things dear ; that there was no altering or lowering of prices in this sense. . . . If Parliament ever could enforce for a time any change in this proportionate, the consequences would only be, that by interfering they would raise an alarm of scarcity, which must necessarily run up the prices of the market ; and if they made any forced regulations, they would only increase the embarrassment and trouble of business, which those who were concerned in it would be paid for, and this therefore would here again raise the prices in the market ; that therefore, so far as these matters count, they had better not meddle, but leave everything free and open to find its own level.

That Parliament was prepared to agree with this reasoning is clear from the Act which it passed in this year to repeal many of the older statutes against forestalling, engrossing and regrating.[2] In fact these views had been gathering force all through the eighteenth century. They made for the cessation of that control over commerce and industry which, in the Middle Ages, had been exercised partly by the central government and partly by the organs of local government ; and had been maintained in an altered shape in the sixteenth and early seventeenth centuries. Let us look at one or two concrete instances.

The assessment of wages by the justices had practically ceased in the eighteenth century. In one or two exceptional cases such assessments were made.[3] But the fact that they had ceased to

[1] Parlt. Hist. xvii 553-554.

[2] 12 George III c. 71 ; for these statutes see vol. xi 468-469.

[3] Cunningham, English Industry and Commerce ii 43-44, 509 n. 2 ; references to a few eighteenth-century assessments will be found, ibid 896-897 ; and see Economic Journal iv 513-518 ; viii 344-346 ; in Middlesex there are very few signs that the justices ever interfered with wages at the beginning of the eighteenth century. E.g. Dowdell, A Hundred Years of Quarter Sessions 151, says that in Middlesex, " from 1725 onwards we look in vain for the faintest sign of the most perfunctory action " ; this is corroborated by Fielding, Enquiry into the Late Increase of Robbers, Works viii 577, cited ibid ; on the other hand they frequently enforced contracts to pay wages, ibid 153 ; the fact that this activity ceases in and about 1720, ibid 154, may be due to the growth of courts of Request erected by statute for the enforcement of small debts, vol. i 190-191, and establishment of new county courts for Middlesex in 1753, ibid 191.

be general is illustrated by a statute of 1756,[1] in which it was thought necessary to give the justices express power to assess the wages of operatives in the wool industry; and the fact that economic opinion was gravitating to the view that such legislative fixing of wages did more harm than good, is shown by the repeal of this statute in the following year,[2] on the ground that "it is found impracticable to form any general rate of wages which would be just adequate and suitable to the several branches and circumstances of the said manufacture."[3] We shall see that a suggestion made at the beginning of the nineteenth century to revert to the old method of fixing wages was defeated for similar reasons.[4]

The legislative fixing of prices was generally abandoned as equally impracticable. The only cases in which an attempt to maintain the older rules was in the case of corn and in the case of bread. In the case of corn it was necessary to know the price of corn both to fix the import duty, and to ascertain whether the price had sunk to such a level that export was permissible. Therefore the Legislature found it necessary to give the justices and other authorities power to fix prices.[5] In the case of bread times of scarcity tended to lead to manipulations of the market and profiteering. It was therefore desirable to have some machinery for the fixing of prices in the interests of the poorer classes. In Governor Pownall's speech in 1772 it was admitted that, though generally it was useless for Parliament to attempt to fix prices, yet if "bread bore a higher price than it ought to in proportion to wheat and flour . . . this was . . . an oppression upon the poor in which they ought to be relieved."[6] For these reasons the old ideas as to the duty of the government to fix a just price and to ensure the good quality of the manufactured article[7] still survived in the case of bread. The powers, which had been given by the assize of bread,[8] of regulating prices and modes of manufacture were brought up to date in 1709.[9] The law on these matters was codified and rendered more precise in 1758,[10] and there was further legislation in 1763[11] and 1773.[12] But

[1] 29 George II c. 33; cp. Cunningham, op. cit. ii 509 n. 2, 639 n. 2; vol. xi 471.
[2] 30 George II c. 12 § 1. [3] Ibid c. 12 preamble.
[4] Cunningham, op. cit. ii 716-718; vol. xi 467.
[5] 2 George II c. 18 §§ 1-3, 5; 10 George III c. 39; vol. xi 457-458; these and other statutes on this subject were repealed by 31 George III c. 30 § 1, and by §§ 34-56 other provisions for the registration of prices by inspectors of corn returns were made.
[6] Parlt. Hist. xvii 554. [7] Vol. iv 375-378.
[8] The Assize of Bread is one of the so-called statutes of uncertain date, vol. ii 222; the older editions of the statutes ascribe it to 51 Henry III; for its enforcement, and the enforcement of the later statutes which replaced it in Middlesex, see Dowdell, op. cit. 176-182.
[9] 8 Anne c. 18. [10] 31 George II c. 29.
[11] 3 George III c. 11. [12] 13 George III c. 62.

bread was almost the only article as to which the mediæval ideas, and therefore the mediæval powers of the justices and other organs of the local government survived.[1]

The powers exercised by the central and the local government over the conduct of particular trades tended either to disappear, or to change their shape. Here and there in some of the franchise jurisdictions and the boroughs such mediæval functionaries as ale tasters and searchers continued to be appointed; but it is very doubtful whether they continued to exercise their functions.[2] Parliament from time to time passed statutes relating to particular trades, and either gave to the persons carrying on these trades, or to persons appointed by the justices, power to make regulations for these trades.[3] But for the most part the statutes relating to particular trades merely prohibited practices and imposed penalties, so that the work of the justices was limited to enforcing them as part of their general duties to try, summarily or otherwise, the offences created by these statutes.[4] The fact that the central government had no body of inspectors to see to the enforcement of these statutes made them ineffective. In practice they did little to impede the rising movement in favour of allowing traders unfettered freedom to conduct their businesses in any manner that they pleased.

Rating.

We have seen that the Tudor and Stuart legislation as to rating, like the legislation as to commerce and industry, had placed administrative duties on the parish and its officials and on the justices.[5] But, whilst the administrative duties of the justices in relation to commerce and industry had tended to become less onerous in consequence of the greater economic freedom allowed to traders, their duties as to rating tended to become more complex.

[1] In 1744 an Act was passed (17 George II c. 35) to explain and amend 16, 17 Charles II c. 2 as to the regulation of the measures and prices of coal; we do not hear much of the enforcement of the assize of ale in Middlesex after the end of the seventeenth century, Dowdell, op. cit. 183-184; or of much activity in prescribing the rates for land carriages in accordance with 3 William and Mary c. 12, ibid 185 n. 1; vol. xi 469-470.

[2] Webb, The Parish and the County 224, 400; The Manor and the Borough 47, 58, 159; for an account of some of these officials in Middlesex at the end of the seventeenth and the beginning of the eighteenth centuries, and for an account of the activities of the clerk of the market, and his disputes with the clerk of the market of the King's household, see Dowdell, op. cit. 160-164.

[3] Vol. xi 418-419, 421-424.

[4] If a reference is made to such titles of Burn's Justice of the Peace (23rd ed. 1820) as *Butter and Cheese*, *Buttons*, *Coals*, *Silks*, *Woollen Manufacture*, it will be seen that most of the statutes are of this kind.

[5] Vol. iv 141, 144, 157-158, 393, 379.

The Tudor legislation as to the poor law had made the parish the unit of rate assessment.[1] The overseers of the poor, in conjunction with the high and petty constables, were responsible for collecting it after it had been allowed by the justices ;[2] and they must account to the justices.[3] In addition to the rates authorized by the Tudor statutes, the Council were in the habit of ordering rates to be made for various purposes, such as the maintenance of soldiers ; and of hearing disputes on questions of rating.[4] These activities of the Council ceased after 1641 ; but the rates authorized by the Tudor statutes and later legislation remained. Many statutes allowed the justices at quarter or general sessions to impose other rates for various purposes—for the repair of highways and bridges,[5] for building and repairing gaols,[6] for building houses of correction,[7] for the relief of poor prisoners and for the upkeep of hospitals and almshouses,[8] for the provision of a stock to set poor prisoners on work,[9] for the passing and conveying of vagabonds.[10] The manner of raising these rates and their amount was sometimes prescribed by the statutes, but much was left to the discretion of the justices on such matters as the setting of a rate, its enforcement, and the basis of assessment. "When the cash in hand was exhausted, Quarter Sessions, at irregular intervals, would order lump sums to be raised. . . . These lump sums were apportioned among all the parishes of the county according to immemorial usage, each having to contribute its accustomed quota."[11] The high constable made his demand on the parish, and the petty constable must collect the amount and pay it over. If the high constable did not produce the money he could be attached for contempt.[12] The basis of assessment was as primitive as the methods of collection—sometimes the rate was on acreage, sometimes it was on the rental value of the property—a "pound rate."[13] What was done in the counties by the justices in quarter and general sessions, was done by the borough justices in the towns. They raised similar rates "in the nature of a county rate" which were called by different names in different places, under the authority either of their charters or of statutes.[14]

[1] Vol. iv 157. [2] 43 Elizabeth c. 2 § 1 ; below 277.
[3] 43 Elizabeth c. 2 § 2 ; vol. iv 157. [4] Ibid 86 ; vol. vi 63-64.
[5] 22 Henry VIII c. 5 ; 1 Anne Stat. 1 c. 18 § 2 ; the rate for bridges sanctioned by 22 Henry VIII c. 5 § 4 was perhaps the earliest statutory rate ; it was provided that four justices in each county in which there was a bridge out of repair should summon the constables or two inhabitants from each parish, and with their consent assess a rate on the inhabitants of the parish ; the justices were given power to appoint collectors for each hundred ; see Coke, Second Instit. 703-705.
[6] 11, 12 William III c. 19 § 1. [7] 7 James I c. 4.
[8] 14 Elizabeth c. 5 § 37 ; 43 Elizabeth c. 2 §§ 12 and 14.
[9] 19 Charles II c. 4 § 1. [10] 12 Anne Stat. 2 § 23.
[11] Webb, The Parish and the County, 498. [12] Ibid. [13] Ibid 540-541.
[14] Webb, The Manor and the Borough 389, 703 n. 3.

At the beginning of the eighteenth century the multiplicity of these rates, and the provisions of the statutes as to the manner and methods of collection, had given rise to many doubts and difficulties.[1] In order to remedy this state of affairs an Act was passed in 1739 "for the more easy assessing, collecting, and levying of Country Rates," [2] which was the principal Act on this subject till 1815.[3]

In place of the separate rates heretofore authorized by separate Acts, the justices were to make one general rate.[4] The sums assessed were to be paid out of the poor rate by the churchwardens and overseers to the high constables.[5] In places where no poor rate was collected it was to be levied by the petty constables.[6] The high constables were to pay the money collected to treasurers appointed by quarter sessions at a salary not exceeding £20 a year, who were to disburse the money as ordered by the justices.[7] The high constables and the treasurers were to account to quarter sessions;[8] and the justices in quarter sessions could make orders compelling petty constables or other rate collectors to account to quarter sessions.[9] No new rate was to be imposed till three-fourths of the money collected by virtue of the preceding rate had been spent.[10] Parishes could appeal against their assessments to quarter sessions.[11] It was, as we have seen,[12] especially provided that no money could be spent on the repair of bridges, gaols, or houses of correction, unless a presentment as to want of repair had been made by a grand jury.[13]

It is obvious that the administrative and judicial powers of the justices in the matter of rating were both simplified and increased by this Act. We shall see that the decisions of the justices and appeals to the courts of common law, taken by way of writ of certiorari, were gradually laying the foundation of a law as to rates and rating.[14]

[1] "Whereas it is apparent that the manner and methods prescribed by the said several Acts for collecting some of the said rates are impracticable, the sums charged on each parish . . . being so small, that they do not by an equal pound rate amount to more than a fractional part of a farthing in the pound on the several persons thereby rateable; and if possible to have been rated, the expense of assessing and collecting the same would have amounted to more than the sum rated: and whereas many great doubts difficulties and inconveniences have arisen in making and collecting other of the said rates," 12 George II c. 29 preamble; see Dowdell, A Hundred Years of Quarter Sessions 12-13; for a complaint in 1745 as to the partial manner in which the justices and overseers exercised their powers see Parlt. Hist. xiii 1300-1303.

[2] 12 George II c. 29.
[3] 55 George III c. 51.
[4] 12 George II c. 29 § 1.
[5] § 2.
[6] § 3.
[7] §§ 6 and 11.
[8] §§ 7 and 8.
[9] § 17.
[10] § 10.
[11] § 12.
[12] Above 148.
[13] § 13.
[14] Below 277 seqq.

Highways.

The Tudor legislation as to highways placed the liability for their repair upon the parish,[1] gave the parish power to collect a rate for this purpose,[2] and enabled a justice of the peace to present a varied assortment of offences against the statutes relating to the highways.[3] This legislation also laid upon the surveyors of highways [4] the duty of presenting such offences to the nearest justice of the peace, and required the justice to certify the offence to the next general sessions.[5] These duties of presentment and certification did not give the justices any administrative powers. But these powers were given by the statute of 1555, which enabled the justices to compel the high constables to account for the fines received for highway offences, and to pay them over to the constables and churchwardens of the place where the offence was committed ; [6] and by the statute of 1576, which enabled two justices to compel the surveyors of highways, the petty constables, and churchwardens, to account for all monies which they had received as fines for highway offences.[7] Their administrative powers were further increased in 1691.[8] At a sessions to be held on January 3 in each year they were given power to nominate surveyors of highways out of a list prepared by the constables and inhabitants of the parish.[9] Once every four months they were to hold a special sessions at which the surveyors of highways must attend ; and at this sessions the justices must explain to the surveyors what their duties were.[10] Before any surveyor was discharged he must account to the justices at one of these special sessions.[11] At these sessions the justices were empowered to levy a rate to reimburse to the surveyors their expenses ; [12] and, if they were satisfied that the highways could not be amended without a rate, they were empowered to levy a rate.[13] A statute of 1697 gave the quarter sessions power to enlarge highways, making compensation to the neighbouring land-owners, and raising the money required by a rate ; [14] and gave the special sessions held under the statute of

[1] Vol. iv 156 ; below 311 ; for cases where this liability was placed on other persons or bodies see below 311-313.

[2] Vol. iv 157 and n. 7.

[3] 5 Elizabeth c. 13 § 8 ; Dalton, The Country Justice (ed. 1742) chap. 50, pp. 113-115 ; for the extensive use made of this statute in Middlesex, and for the legal effects of such presentments see Dowdell, op. cit. 94-97.

[4] For these surveyors see vol. iv 156 ; above 130.

[5] 5 Elizabeth c. 13 § 7 ; Dalton, op. cit. 115.

[6] 2, 3 Philip and Mary c. 8 § 4.

[7] 18 Elizabeth c. 10 § 3 ; in Middlesex the justices adopted a system of conditional fines, i.e. if the road was repaired by a certain date the fine was not imposed, Dowdell, op. cit. 94-97.

[8] 3 William and Mary c. 12. [9] § 2. [10] § 7.
[11] § 7. [12] § 12. [13] § 16.

[14] 8, 9 William III c. 16 §§ 1 and 2.

1691 power to order the surveyors to set up guide posts.[1] A statute of 1714 gave the justices power to order particular roads to be repaired, and to give directions how the work was to be done.[2] The same statute, and another statute of 1736, gave borough justices power to employ scavengers for the cleansing and repairing of streets, and to make a rate for this purpose.[3]

The large number of statutes which made small changes in the law was, in the latter half of the century, a cause of considerable confusion.[4] A codifying Act, which repealed all previous legislation, was passed in 1766.[5] It was superseded by another codifying Act in 1773.[6] This Act remained the basis of the law till it was recodified with many amendments by the Highway Act of 1835.[7] Under the Act of 1773 special highway sessions were to be held in the week next after the Michaelmas quarter sessions,[8] and any two justices could hold a special sessions for highway business when they saw fit.[9] At Michaelmas surveyors were to be appointed from lists submitted by the parish officers and ratepayers.[10] If no lists were submitted the justices were given power to appoint, and to pay their appointee a salary.[11] By a two-thirds majority the parish meeting, assembled to submit lists of names to the justices, could recommend the justices to appoint a particular person at a salary, and the justices, if they saw fit, could follow this recommendation.[12] The justices were given power to administer land left on trust for the repair of highways and bridges,[13] to prescribe the time and manner in which highways were to be repaired,[14] and to set up guide posts, milestones, and, if a highway was liable to be flooded, posts indicating the depth of water on the road ;[15] and they were given large powers of widening and diverting highways and footpaths, and of stopping up any found not to be necessary.[16]

These illustrations show that the administrative powers of the justices over the highways were increasing all through the century. We shall see that the principles of the common law upon which these statutes were based, and the cases to which these principles and the interpretation of these statutes were giving rise in the common law courts and at quarter sessions, were laying the foundations of the modern law on this subject.[17]

[1] § 7. [2] 1 George I c. 52 § 3.
[3] Ibid c. 52 § 9 ; 9 George II c. 18 § 3.
[4] Webb, The Story of the King's Highway 45-46.
[5] 7 George III c. 42. [6] 13 George III c. 78.
[7] 5, 6 William IV c. 50. [8] § 1. [9] § 1. [10] § 1.
[11] § 1. [12] § 5. [13] § 52. [14] § 25. [15] § 26.
[16] §§ 16, 17, 20, 21, 22 ; § 19, which provided for diversions with the consent of the owner of the land, was modified by 55 George III c. 68 which provided for public notice of a project to divert or stop up, and gave wider powers to the justices and a more speedy procedure.
[17] Below 299 seqq.

The Poor.

With the exception of their duties in keeping the peace, the duties of the justices in relation to the poor law were the most important and the most difficult. The books on the justices of the peace make this fact quite obvious. We have seen that in the eighth edition of Burn's book the title "Poor" takes up one hundred and thirty pages, and that it is by far the longest title in the book. A large part of these duties was administrative. They offered a wider field for the exercise of statesmanship; for the problem of the poor was a pressing problem all through the eighteenth century, and gave rise to much speculation and to many schemes for its solution.[1]

The foundation of the poor law of the eighteenth century was the Tudor legislation, which made the parish, the officials of the parish, and the justices of the peace, responsible for its administration.[2] The collapse of prerogative government in 1640, and the consequent cessation of that central control of the persons and bodies who administered the poor law,[3] left those persons and bodies very free to administer the law as they saw fit. In this, as in other branches of the local government, the Great Rebellion gave the organs of local government an autonomy which they had not possessed in the sixteenth and early seventeenth centuries;[4] and the Revolution confirmed that autonomy. A certain number of new powers were given to the parishes and the justices of the peace by the Legislature; but, for the most part, they were left to administer the law in the manner which seemed most expedient to their particular districts. Let us look at the manner in which modern ideas were introduced into this part of the local government of the country under these two heads:

(i) We have seen that, in the latter part of the seventeenth century, the poor law had ceased to be an integral part of the economic policy pursued by the state.[5] It had ceased to be "part of a paternal system of government under which rulers regarded the maintenance of the usual prosperity of every class as part of their duties."[6] The result was that persons who sought relief by the agency of the poor law were regarded as persons who were to some extent to blame for their position, and were therefore persons who, like the impotent and the vagrant, were of a definitely lower status than the rest of the self-supporting members of the community. The "stigma of pauperism" was attached to all persons, whether deserving or not, who sought

[1] Below 212-214, 275. [2] Vol. iv 156-157, 397. [3] Ibid 400-401.
[4] Vol. vi 349-350. [5] Ibid 349, 353.
[6] Leonard, Early History of Poor Relief 203, cited vol. iv 399.

relief through the agency of the poor law.[1] Pauperism, however caused, was a disease of the body politic which the state, acting through the bodies and officials responsible for the local government, must endeavour to cure. Hence, neither in the measures taken by the Legislature, nor in the expedients adopted by the parishes and the justices of the peace, do we find many attempts to discriminate between the deserving and the undeserving poor.

The two most important Acts of this century were an Act of 1722,[2] and an Act of 1782.[3] The Act of 1722 deprived justices of the peace of the power to overrule a refusal of the overseer to relieve paupers, and to order relief, unless the pauper swore that there was reasonable ground for relief, and the justices had heard the cases of the overseers and the pauper.[4] It then went on to give a parish power to keep houses for the maintenance of the poor, and to provide that, if a pauper refused to be maintained in these houses, he should have no right to relief.[5] Power was given to two or more small parishes to unite to provide such a house.[6] The Act of 1782,[7] generally known as Gilbert's Act,[8] was a more elaborate Act, which applied only to parishes who chose to adopt it. It attempted to distinguish between the impotent poor, and the able-bodied poor. The impotent poor were to be maintained in workhouses provided by unions of parishes, which were to be controlled by salaried guardians and governors, and by visitors of high social rank.[9] The able-bodied poor were to be provided with employment by the salaried guardians or otherwise relieved.[10] Any justice of the peace could order the guardians to give relief, or admit such persons to the workhouse[11] —thus to some extent contradicting the section of the Act which provided that only the impotent poor were to be sent to the workhouse.[12] Comparatively few parishes adopted the Act; and in those which did adopt it the workhouse tended to degenerate into a "general mixed workhouse," which made no discrimination between the character of its inmates.[13] In addition to these

[1] Vol. vi 353-354.
[2] 9 George I c. 7; Webb, The Old Poor Law 121, 151, 243-245.
[3] 22 George III c. 83; Webb, op. cit. 151, 272-276.
[4] 9 George I c. 7 § 1.
[5] § 4; 36 George III c. 23 restored to the justices the power to give out relief, though the parish maintained a workhouse.
[6] § 4.
[7] 22 George III c. 83.
[8] For Gilbert see Webb, The Old Poor Law 273; he was "one of the most influential of the 'country gentlemen' legislators," and from 1784-1795 he was chairman of the committee of ways and means, and had much influence on the action of the House of Commons in respect of local Acts; in 1775 he had got a committee appointed which reported on the defects of the poor law, and advocated reforms, some of which were carried out by the Act of 1782, Parlt. Hist. xviii 541-552.
[9] 22 George III c. 83 §§ 3, 9, 10, 29.
[10] § 32.
[11] § 35.
[12] Webb, op. cit. 275 n. 2.
[13] Ibid 275-276.

two Acts, there are one or two other Acts dealing with the duties of the parish authorities as to apprenticeship,[1] and imposing other minor duties upon them.[2]

Looking at this legislation as a whole it would be true to say that it added to the powers of the justices and the parish authorities, and that it did very little to limit their freedom to choose between different methods of relieving the poor. In fact the authorities of each district adopted the methods which seemed to them to be most appropriate, without paying very much regard either to statutes or to the methods adopted by other districts.[3] The result was that the methods used to relieve the poor in different districts were very various.

(ii) The easiest way of dealing with the poor was to give them small money doles or relief in kind. This course was adopted by many overseers as the line of least resistance, and by the justices if, on appeal from an overseer's refusal to relieve, they ordered relief.[4] An Act of 1692 provided for the making of an annual list of those who were thus relieved,[5] and an Act of 1697 ordered that all who were thus relieved should wear a pauper badge.[6] The latter Act was little observed ;[7] but there were many attempts to check the rising poor rates by insistence on the observance of the former Act, and sometimes by insisting on enquiries before any new names were inserted.[8] But there was little system in the manner in which this relief was given by the overseers or the justices. It is true that the Act of 1722 enabled and perhaps required the overseers and the justices to refuse such relief if an applicant refused to come into the workhouse.[9] But the policy of refusing outdoor relief to those who refused to come into the workhouse was abandoned at the end

[1] 13 Anne c. 26 § 18; 7 George III c. 39 §§ 13-15; 20 George III c. 36.

[2] 2 George III c. 22—registration of poor children within the district covered by the bills of mortality; 7 George III c. 39—care of poor children within the district covered by the bills of mortality; 16 George III c. 40—returns to be made by overseers as to the cost of poor relief, the numbers relieved, whether there was a workhouse in the parish, and the amount spent in litigation.

[3] "Between the statute book and the actual administration of the parish officers there was, in the eighteenth century, normally only a casual connection. . . . The fifteen thousand parishes and townships that were separately maintaining, relieving, or neglecting their own poor, habitually did so with the very slightest attention to Parliamentary enactments, and the very smallest knowledge of what was being done elsewhere," Webb, The Old Poor Law 149-150.

[4] Webb, op. cit. 159-168; the legality of this action of the justices was doubtful, but it was said in Waltham v. Sparks (1696) 1 Lord Raym. at p. 42 that all the justices did it, and "communis error facit jus"; see vol. vi 354 n. 2.

[5] 3 William and Mary c. 11 § 11.

[6] 8, 9 William III c. 30 § 2; vol. vi 354.

[7] Webb, op. cit. 161.

[8] Ibid 163-166.

[9] 9 George I c. 7 § 4; Webb, op. cit. 244; the Act certainly disentitled the pauper who refused to come into the house to relief, but it is not clear that it deprived the overseers and justices of their power to give it—though it would seem from 36 George III c. 23, above 174 n. 5, that it was assumed that it had this effect.

of the century ;[1] and the widespread destitution, arising from bad harvests and low wages, led to the systematic grant of definite sums in aid of wages according to the size of the applicant's family.[2] The resolution of the Berkshire justices at Speenhamland to adopt a definite scale of relief, graduated according to the price of bread and the size of the applicant's family, was followed in most of the counties of England and Wales at the end of the eighteenth and the beginning of the nineteenth centuries.[3]

Many parishes under the Act of 1722, or by virtue of local Acts before and after 1722, had provided themselves with workhouses.[4] These workhouses differed enormously from place to place, largely, as the Webbs have pointed out, because they were used by different localities for many different purposes—as a means for setting the poor upon some profitable work, as a house of correction, as a means of deterring applicants for relief, as a hospital for the impotent.[5] But generally it would be true to say that owing to the absence of any central control, and to the small supervision which the justices were able to give to these institutions, all sorts of abuses grew up and flourished, with the result that they were unable to fulfil any of these purposes.

> Although the workhouse was frequently started with a special design, or for a particular purpose—such as profitably employing the able bodied, providing an asylum for the impotent, or supplying a deterrent to applicants for relief—it was always crumbling back into what the twentieth century terms the General Mixed Workhouse, in which all destitute persons, irrespective of age, sex and condition, are indiscriminately housed and maintained.[6]

The impossibility of compelling respectable persons to enter such institutions explains why it was necessary for the justices to give extensive out relief, and why Parliament extended their powers to give this relief.[7]

The incompetence of the annually appointed and unpaid overseers, and the impossibility of maintaining continuous

[1] Webb, op. cit. 170-171. [2] Ibid 172-173.

[3] Ibid 177-183. " The scales of the different counties or divisions of counties were usually fixed at meetings of the Justices, and they were distributed by the Clerk of the Peace or the clerk of the petty sessional division to all the Overseers of the district. . . . At Bocking in Essex, in 1833, the printed copy in use by the Overseer bore the magic heading ' according to Act of Parliament '," ibid 181 ; thus as Bowden says, Industrial Society in England towards the End of the Eighteenth Century 207, poor relief became " a bounty paid to the export industries."

[4] Many were established in the last years of the seventeenth and the early years of the eighteenth century, Lipson, Economic History of England iii 477 ; Mr. Lipson says that this was due to the war with France which had led to the decay of trade and consequent unemployment and destitution.

[5] The Old Poor Law 219-221.

[6] Ibid 218 ; see the resolutions of the House of Commons in 1735, Parlt. Hist. ix 965-966, and in 1759, ibid xv 941-942.

[7] The Old Poor Law 279-282 ; above 175 n. 9.

supervision of the paid servants employed by the local authorities to manage their workhouses, induced some of the parish authorities and the justices to adopt the plan of getting their duties performed by contract. The Act of 1722 empowered parishes to hire houses, and to contract with persons for the maintenance of the poor in return for the benefits to be derived from the work of the poor there maintained.[1]

> From that time forward, right down to 1834 we find every variety of farming the poor—contracting for the maintenance of all the paupers having any claim on the parish; contracting merely for the management of the workhouse; contracting for infants and children; contracting for lunatics; and contracting for medical relief.[2]

It was an expedient which was applied in many other departments of local government;[3] for it seemed to be the most obvious expedient at a time when the mediæval expedient of amateur and unpaid service was breaking down, and the modern expedient of professional and paid service, adequately and continuously controlled, was as yet undreamed of.

Of these and other expedients adopted by the parishes and the justices to perform their duties to the poor, and of their consequences, I shall have more to say later.[4] At this point I have only mentioned some of them (just as I have only mentioned some of the powers given to these authorities by the Legislature) in order to illustrate the new ideas which were gradually transforming the system of local government during the eighteenth century. It was this part of the work of these organs of local government which did most to introduce modern ideas of administration, and to free the justices and the other organs of local government from the mediæval idea of fitting all the activities of the officials and communities in the sphere of local government into the framework of presentment and indictment for the breach of the duties imposed on them by the law.[5]

Vagrancy.

In the Tudor scheme of government the treatment of vagrancy was a subject which was closely allied to the poor law. We have seen that the Elizabethan statutes provided for the relief of the impotent, the apprenticeship of their children, the provision of work for the able bodied, and the punishment of the able-bodied vagrant and of those who refused to work.[6] The vagrancy Act

[1] 9 George I c. 7 § 4. [2] Webb, The Old Poor Law 277.

[3] "Whether it was the building of a bridge or the conveyance of vagrants, the transportation of convicts or the lighting of thoroughfares, all difficulties seemed to be solved by asking what contractor would undertake to execute the service for the lowest cash payment," ibid; below 180, 194, 208, 217, 233.

[4] Below 272. [5] Above 146-149. [6] Vol. iv 392.

of 1597 repealed all earlier Acts, and codified and amended the law.[1] It defined the persons who fell under the categories of rogues, vagabonds, and sturdy beggars.[2] Such persons were to be whipped, sent to the place whence they had come or where they had last dwelt for a year, and there kept at work in the house of correction.[3] This Act continued to be the principal Act on this subject till 1713.[4] An Act passed in that year recodified the law. It enlarged the list of persons who fell under the description of rogues and vagabonds;[5] defined the procedure to be followed by the justices in punishing and passing such persons to their parish of settlement;[6] provided more severe punishment for dangerous rogues and still more severe punishment for dangerous and incorrigible rogues;[7] penalized parishes in which such persons were settled if they did not set such persons to work;[8] penalized masters of ships who brought rogues into the kingdom from Ireland, the Isle of Man, the Channel Islands or the Plantations;[9] and gave the justices power to apprentice such persons or to put them to service in Great Britain or the Plantations for seven years.[10] This Act was superseded by an Act of 1740;[11] and the Act of 1740 was replaced by an Act of 1744,[12] which consolidated and elaborated the law. The Act of 1744 made more precise the different categories of vagrants, which had appeared in the Act of 1713, by dividing them into the three classes of idle and disorderly persons, rogues and vagabonds, and incorrigible rogues.[13] This Act was later amended and added to. Thus, in 1752, the justices were empowered to examine persons charged with being rogues and vagabonds as to their places of settlement and means of getting a livelihood; and if they could not show that they had lawful means of getting a livelihood, or could not secure a householder to answer for them, they could be imprisoned for six days.[14] But the Act of 1744 remained the principal Act until 1822,[15] when it was replaced by a temporary

[1] 39, 40 Elizabeth c. 4; for the earlier Acts see vol. iv 394; in the Act of 1597, and in other vagrancy Acts, down to 1744 there is a clause saving the rights of the heirs of John Dutton who claimed jurisdiction over minstrels and vagrants in Cheshire under a grant of 1216; the lords of Dutton held a court for minstrels and received dues from them till 1756, and their right to license minstrels was recognised down to 1822, Webb, The Old Poor Law 354 n. and references there cited.

[2] 39, 40 Elizabeth c. 4 § 2; vol. iv 397 n. 6. [3] Ibid 398.
[4] 13 Anne c. 26. [5] § 1. [6] §§ 4 and 5. [7] § 6.
[8] § 17. [9] § 24. [10] § 18.
[11] 13 George II c. 24. [12] 17 George II c. 5.
[13] §§ 1 and 4.
[14] 25 George II c. 36 § 12; this section was probably due to Fielding who had pointed out the evils of vagrants living in common lodging-houses, who were not caught by the existing Act, since they had a place of abode, B. M. Jones, Henry Fielding 192-194.
[15] 3 George IV c. 40.

consolidating Act, which was amended and made permanent in 1824.[1]

One of the clauses of the Act of 1744 gave the justices power to confine lunatics, and to take any property which the lunatic had to pay the cost of his maintenance.[2] Later in the century the need for controlling the madhouses or asylums in which lunatics were confined became apparent; and arrangements were made for licensing them and controlling them. In London and Middlesex these powers of control were vested in a committee elected by the College of Physicians, and in the country in quarter sessions.[3]

In so far as these statutes made various classes of vagrants amenable to the criminal law, they merely added to the criminal jurisdiction, summary or otherwise, of the justices, and imposed on the constables and other officers of local government the duty of bringing vagrants to justice. But these statutes did more than this, they imposed on the justices the duty of taking measures of an administrative kind which, it was thought, would abate the nuisance of vagrancy. The device of suddenly making a privy search for vagrants, and arresting and punishing all those found, had been sanctioned by statute from 1495 [4] onwards. The Act of 1744 gave the justices power to enlist male vagabonds and incorrigible rogues in the army or navy,[5] and, at the request of the Privy Council, considerable use was made of this power, which was sometimes used in connection with the device of the privy search.[6] But, in spite of the efforts of the Legislature and the justices, the plague of vagrants, especially in London and other urban centres, was not diminished.[7] In the latter part of the century less use was made of the punitive provisions of the vagrancy Acts—they were too barbarous.[8] But it was necessary to do something to prevent these vagrants from becoming a charge upon the poor rates.

[1] 5 George IV c. 83; for the wide powers of dealing with vagrants sometimes given by local Acts to incorporated guardians of the poor see below 214.

[2] 17 George II c. 5 § 20.

[3] 14 George III c. 49 §§ 2 and 23, made perpetual by 26 George III c. 91; as early as 1763, a committee of the House of Commons had brought to light some of the abuses connected with private madhouses in respect to the admission of patients and their treatment, and had reported that legislation was needed, Parlt. Hist. xv. 1283-1290.

[4] 11 Henry VII c. 2; Webb, The Old Poor Law 361-367; for the use sometimes made by the London trading justices of this device of a search in order to extract bail fees from those arrested see vol. i 146.

[5] 17 George II c. 5 § 9.

[6] Webb, The Old Poor Law 366.

[7] Ibid 358-361.

[8] "The public whipping of men and women . . . seemed an intolerable barbarity. The physical horror and moral contamination of the gaols, of which John Howard had made the more intelligent justices acutely conscious, made them loth to sentence mere beggars or poor travellers to imprisonment. . . . The net effect was that . . . both kinds of punishment fell into disuse," ibid 375-376.

In this dilemma the Local Authorities resorted to two extra-legal devices. They used the threat of arrest and punishment as a means of frightening the beggars and vagrants away from particular parishes. On the other hand, there grew up a systematic perversion of the Vagrancy Act, under which the destitute wanderer was apprehended, frequently at his own request, not with any idea of punishment, but in order to dispatch him, with a "pass," to his own parish, without cost to the place in which he had been taken up.[1]

In many places this passing of vagrants was contracted for by the justices [2]—a practice which was in effect sanctioned by a statute of 1792.[3]

As with the poor law, so with the closely connected subject of vagrancy, the justices found that they must do a great deal more than merely enforce the criminal law. They found that in this, as in many other branches of their work, they were obliged to adopt some kind of a policy, and to take administrative measures to carry this policy into effect.

Houses of Correction and Prisons.

We have seen that in the Tudor period the house of correction was an integral part of the national system of poor relief. Since that system proposed to relieve the able-bodied poor by the provision of work, some mode of constraint was needed for those who refused to work. That means of constraint was provided by houses of correction which the justices were directed to build in each county.[4] They were regarded as being reformatories, as distinct from gaols, which were places of detention till trial or of punishment.[5] We have seen that in Coke's opinion they were, at the beginning of the seventeenth century, effecting this object.[6] From the first the justices had entire control of these institutions. Their administrative powers over them were as large as their administrative powers in respect of the poor law or of vagrancy. But, after the Great Rebellion, the freedom of the justices from control by the central government tended in this, as in other parts of their duties,[7] to make them take their responsibilities very lightly; and, just as the character of the poor law changed at the end of the seventeenth century,[8] so necessarily did the character of the houses of correction. The idea of providing work for the pauper was generally abandoned;

[1] Webb, The Old Poor Law 376. [2] Ibid 384-387.
[3] 32 George III c. 85 § 6; Webb, op. cit. 385.
[4] Vol. iv 396, 397-398.
[5] "So little at the outset were these places regarded as places of punishment, and so much the means of finding employment for the unemployed poor that it was evidently not unusual, about the middle of the seventeenth century, to give the inmates regular wages in return for their work," Webb, English Prisons under Local Government 13.
[6] Vol. iv 396. [7] Above 133. [8] Vol. vi 353-354.

deserving applicants were generally given out relief ;[1] and so the house of correction ceased to be a place where those who refused work could be reformed by being compelled to do it. They came to be gaols, where vagrants and others guilty of minor offences, could be confined.[2]

> The Justices no longer concerned themselves with work for the unemployed poor, or of disciplinary employment for sturdy rogues and vagabonds. They merely handed over to the master [of the house of correction] a power to exact from his prisoners whatever labour he chose, partly as a means of relieving the county from the expense of maintaining them, partly as punishment, but in the main as the master's own perquisite by way of supplement to a small salary.[3]

The justices were as negligent in the supervision of the houses of correction as of the gaols.[4] The Legislature gave them enlarged powers to provide these houses, and enlarged powers of management in 1744 ;[5] and the attempts at prison reform, which marked the third quarter of the eighteenth century,[6] produced Acts which provided for the inspection and structural alteration of these houses, and the making of regulations for the treatment and discipline of the inmates.[7] But this legislation seems to have been ineffective,[8] as ineffective as it was in the case of the gaols.[9]

In the eighteenth century the gaols were perhaps the most mediæval institutions in England. There were county gaols for which the sheriffs were responsible, and there were also gaols which belonged, as franchise jurisdictions belonged, to private persons.[10] In both cases the gaol was regarded not merely as a self-supporting institution, but as an institution out of which a profit could be made.[11] Like other mediæval offices the office of gaoler was a saleable office till 1716.[12]

It was not till the end of the seventeenth century that the justices got control of the gaols. A statute of 1700 gave them power to build and repair gaols.[13] But, as yet, they had little or no power to control their management. The enquiry made by the House of Commons in 1729 into the management of the Fleet and Marshalsea prisons revealed hideous abuses, and, in

[1] Above 175, 176.

[2] See 6 George I c. 19 § 2 which gave justices the power to commit persons charged with small offences either to the gaol or to a house of correction; their powers in this respect were further regulated by 17 George II c. 5 § 32; B. M. Jones, Henry Fielding 211-213.

[3] Webb, English Prisons under Local Government 14-15.

[4] Below 182. [5] 17 George II c. 5 §§ 30 and 31. [6] Below 183.

[7] 22 George III c. 64; § 14 of this Act specified the rules, orders and regulations to be observed in these houses; 24 George III c. 55.

[8] Webb, op. cit. 16-17. [9] Below 183. [10] Below 182 n. 7.

[11] Vol. xi 567. [12] 3 George I c. 15 § 10.

[13] 11, 12 William III c. 19, continued by 10 Anne c. 14 § 2 and made perpetual by 6 George I c. 19 § 1.

particular, the cruelties practised on the prisoners by the gaolers Huggins and Banbridge and their underlings.[1] Criminal proceedings were taken against them and other officers of their prisons by order of the House of Commons.[2] Though they managed to secure acquittal, the result of these enquiries was legislation which gave the justices larger powers of control over the gaolers and gaols. They were given powers to control the fees charged by gaolers in 1729,[3] and powers of control and management were given in 1759.[4] In 1773 they were empowered to provide chaplains for gaols ;[5] and, in the following year, the mortality caused by gaol fever, not only to the prisoners but also to the bar and the bench, produced an Act empowering the justices to take measures for cleansing the gaols and the prisoners.[6] But the account which Fielding gives of the gaols in *Amelia* shows that the justices failed to make use of their powers.[7] The campaign of Howard, and his revelations as to the state of the gaols,[8] produced the Act of 1779, which Blackstone was instrumental in getting passed, for the establishment of penitentiaries.[9] The Act made elaborate arrangements for the treatment of the prisoners and for the work which they were to do ;[10] and the reasons assigned for this new departure show that more rational and more humane ideas as to the treatment of criminals were beginning to make their influence felt.[11] Later Acts of 1784 and 1791[12] provided for the rebuilding of gaols, for the appointment by the justices of governors and other officers, for the making of

[1] Parlt. Hist. viii 710-711, 731, 737, 740, 803 ; Lecky, History of England ii 128-129 ; Webb, op. cit. 25-27 ; that there were similar abuses in the seventeenth century appears from the complaints made in 1621 of the way in which the Warden of the Fleet prison treated his prisoners, Notestein, Commons Debates 1621 ii 102, 105, 158, 374-375 ; iv 277-278, 355-356.

[2] 17 S.T. 298, 310, 383, 398, 462, 511, 526, 546, 582.

[3] 2 George II c. 22 § 4.

[4] 32 George II c. 28 § 6.

[5] 13 George III c. 58.

[6] 14 George III c. 59 ; Webb, op. cit. 35 ; Lecky, History of England ii 130 ; vol. xi 567 ; vol xii 455-456.

[7] B. M. Jones, Henry Fielding 208-211, 213-215 ; in 1746 the Archbishop of York said of the gaol at York, " the prisoners die and the Recorder told me yesterday, when the turnkey opens the cells in the morning, the steam and stench is intolerable and scarce credible. The very walls are covered with lice in the room over which the Grand Jury sit," P. C. Yorke, Life of Hardwicke i 501 ; the Gate-House prison, which belonged to the Dean and Chapter of Westminster, was said by Sir John Fielding in 1770 to be hopelessly inadequate, Parlt. Hist. xvi. 935-936.

[8] Webb, op. cit. chap. iii.

[9] 19 George III c. 74 §§ 5-14 ; Lecky, History of England vii 335.

[10] §§ 31-59.

[11] " Whereas, if many offenders convicted of crimes for which transportation hath been usually inflicted were ordered to solitary imprisonment, accompanied by well-regulated labour and religious instruction, it might be the means under providence, not only of deterring others from the commission of the like crimes, but also of reforming the individuals, and inuring them to habits of industry, § 5 ; cp. Bl. Comm. iv 371.

[12] 24 George III c. 54 ; 31 George III c. 46.

rules for the inmates, for the classification of prisoners, and for the visitation of gaols by the justices.

Blackstone was sanguine as to the good results which might be expected from the Act of 1779. He said : [1]

> If the whole of this plan be properly executed, and its defects be timely supplied, there is reason to hope that such a reformation may be effected in the lower classes of mankind, and such a gradual scale of punishment be affixed to all gradations of guilt, as may in time supersede the necessity of capital punishment, except for very atrocious crimes.

Unfortunately this Act was no better enforced than the earlier Acts. Though the Legislature had given large powers to the justices, and also to committees appointed by the central government,[2] except in a few counties when some justice took the trouble to enforce these statutes,[3] little was done till the legislation of the nineteenth century.[4] It would probably be true to say that no part of the administrative duties of the justices was more neglected than these duties of supervising the gaols.[5] This was the inevitable result of casting upon an already overburdened set of officials a large number of new duties, and of providing no means of securing that these duties were fulfilled by these officials.

Liquor Licensing.

Statutes of 1552 and 1627 gave the justices power to license ale-houses, and to take recognizances of their keepers for the prevention of drunkenness and the maintenance of order.[6] Though there were some doubts as to whether these statutes applied to inns for the entertainment of travellers, the better opinion seems to have been that they did apply to inns which sold ale.[7] After the Restoration these statutes were laxly applied,[8] and, till a statute of 1729,[9] no licence was

[1] Comm. iv 371.
[2] 19 George III c. 74 § 15.
[3] Webb, op. cit. 54-62.
[4] Ibid 50-54, 63-65.
[5] Lecky, History of England vii 327 ; vol. xi 567-568.
[6] 5, 6 Edward VI c. 25 ; 3 Charles I c. 4. In vol. iv 515 I have misstated the effect of this legislation. The statute 5, 6 Edward VI c. 25 required ale-houses to be licensed by the justices, and the statute 3 Charles I c. 4 was simply an amending Act. The resolutions concerning inns (Hutton's Rep. 99-100) applied, not to ale-houses, but to inns for the entertainment of travellers ; and it seems to be clear that if an inn was used as an ale-house it required a license, Dalton, Justice of the Peace c. 7, at pp. 24-25, and c. 56, but in Coke's opinion if it was merely an inn it did not ; Notestein, Commons Debates 1621 ii 174 ; until the downfall of prerogative government in 1640 these duties of the justices (like many of their other duties) were strictly enforced by the Council and the judges of Assize ; on the whole subject see Webb, The History of Liquor Licensing in England chap. i.
[7] Last note.
[8] Webb, op. cit. 15-24.
[9] 2 George II c. 28 § 10 ; a statute of 12, 13 William III c. 11 § 18 which required a licence was repealed by 1 Anne St. 2 c. 14 § 1 because it hindered the consumption of English brandy, see Webb, op. cit. 21-22.

required for the sale of spirits. In that year it was enacted that no persons should sell spirits by retail, to be consumed on the premises, unless they had been licensed in the same way as alehouse keepers ;[1] and another statute of the same year imposed new duties on spirits, required retailers to pay £20 a year for a licence to sell, and forbade spirits to be hawked about the streets.[2] These statutes failed to check the free sale of spirits.[3] To effect this object the famous Gin Act was passed in 1736.[4] That Act inaugurated the policy of requiring a double licence—a licence from the justices, and an annual excise licence, for which the heavy fee of £50 was imposed. The Act was generally disregarded,[5] and it was repealed in 1743.[6] The repealing Act continued the policy of a double licence, but only 20s. was to be paid for the annual excise licence.[7] The first licence represented the need for regulating the traffic in intoxicants : the second the interest of the revenue. This policy of a double licence was extended to beer licences in 1808.[8] A statute of that year required the applicant for a licence to get both an excise licence and a justices' licence.[9] The result was that in the case both of beer and spirits the publican was obliged to get a justices' licence in order to open his public-house, and an excise licence in order to sell beer or spirits in his house.[10]

The Legislature also laid down rules as to the conditions under which both excise and justices' licences could be granted. Thus, excise licences to retail spirits were only to be granted to those who kept taverns, victualling houses, coffee-houses, or alehouses, and not to grocers, chandlers, keepers of brandy shops, or distillers ;[11] and only to persons who inhabited the house in respect of which the licence to retail was given.[12] The result of all this legislation was to extend largely the powers of the justices in the matter of licensing. But in the middle of the century it was obvious that their powers were not effectively exercised ; and if they were exercised by a zealous justice his decisions were often questioned by writs of certiorari. Fielding exposed the evil effects of this laxity ; and his efforts were helped by the contemporaneous publication of Hogarth's picture *Gin Lane*.[13] His efforts aroused the Legislature to action. In 1751 the justices were given power to search for and seize spirits introduced into gaols, workhouses, and houses of correction ;[14] and no licence

[1] 2 George II c. 28 § 10.
[2] Ibid c. 17, repealed by 6 George II c. 17 § 1 ; Webb, op. cit. 25.
[3] Ibid ; above 82.
[4] 9 George II c. 23.
[5] Webb, op. cit. 26-29.
[6] 16 George II c. 8 § 1.
[7] §§ 8 and 11.
[8] 48 George III c. 143.
[9] §§ 2 and 7.
[10] Burn, Justice of the Peace (ed. 1820) i 41.
[11] 16 George II c. 8 § 10 ; 17 George II c. 17 § 18.
[12] 17 George II c. 17 § 21.
[13] B. M. Jones, Henry Fielding 169-173.
[14] 24 George II c. 40 §§ 13-16.

was to be granted to anyone who occupied a tenement of less than £10 annual value.[1] In 1753 it was enacted that the licensing powers entrusted to the justices should be exercised at special sessions held on the first day of September or within twenty days after[2]—a clause which originated the "Brewster Sessions." Licencees must occupy tenements of the yearly value of £10 or upwards.[3] Brewers, distillers, innkeepers, victuallers, or maltsters must not act as justices in any matter relating to the execution of the Acts relating to spirits, or to the granting of licences to sell spirits or beer.[4] An ale-house licence was not to be granted to any person unless he could produce a certificate from the parson and the majority of the churchwardens and overseers, or from three or four substantial householders, that the applicant was "of good fame and of sober life and conversation."[5] Licences were in all cases to be granted for one year only.[6] Subject to these rules the justices had an absolute discretion as to the granting or refusal of licences; and, because it was an absolute discretion, the courts refused to interfere with it.[7] They would only interfere if some corrupt or illegitimate motive for granting or refusing a licence could be proved.[8] This legislation, therefore, made a considerable addition to the administrative powers which the justices were required to exercise on their own initiative.

During the greater part of the eighteenth century the administration of the justices was lax. They were too ready to grant licences indiscriminately.[9] The trading justices of Middlesex made the most of their opportunities;[10] and "the magistrates of the other counties and municipal boroughs, though free from the gross and unashamed corruption of the trading justices of Middlesex, seem to have been between 1729 and 1786 hardly less negligent in the performance of the duties which Parliament had cast upon them."[11] The sale of intoxicants improved the revenue,[12] the justices were reluctant to raise the poor rate by depriving applicants for licences of an opportunity of making a

[1] § 8.

[2] 26 George II c. 31 § 4, amending 2 George II c. 28 § 11 which had made a similar provision, but had allowed licences to be granted either at the September sessions or at any other general sessions.

[3] 24 George II c. 40 § 8. [4] Ibid § 22; 26 George II c. 13 § 12.

[5] Ibid c. 31 § 2. [6] Ibid § 4.

[7] Stephens v. Watson (1702) 1 Salk. at pp. 45-46; John Giles's Case (1731) 2 Stra. 881; R. v. Young and Pitts (1758) 1 Burr. 556, at p. 561.

[8] "If it clearly appear that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion, and have (consequently) abused the trust reposed in them, they are liable to indictment by prosecution on information; or even possibly, by action, if the malice be very gross and injurious," ibid at pp. 561-562; cp. R. v. Williams and Davies (1762) 3 Burr. 1317; R. v. Holland and Forster (1787) 1 T.R. 692; below 248-249, 251-252.

[9] Webb, The History of Liquor Licensing in England 33-41.

[10] Ibid 41. [11] Ibid. [12] Ibid 42.

living,[1] and the justices' clerks made money out of the fees which were payable on the grant of a licence.[2] In the county of Durham it was the practice of the justices to sign blank licences and to leave them to be filled up at the discretion of the clerk of the peace.[3] These lax conditions facilitated the introduction of the tied house system. The brewers and distillers bought up licensed houses and helped potential customers to establish themselves in these houses.[4]

One of the first effects of the industrial revolution was to put an end to these lax practices. The movement in favour of better regulation began in Lancashire and Yorkshire;[5] and "the royal proclamation against vice and immorality, issued at the instance of Wilberforce in 1787, and sent by the Home Secretary to every bench of magistrates, set going a national movement in the same direction."[6] The justices, up and down the country, made rules as to the conditions under which they would grant licences, and prescribed the conditions under which the trade in intoxicating liquors must be carried on.[7] The devices employed by the justices included

> such modern devices as early closing, Sunday closing, the refusal of new licences, the withdrawal of licences from badly conducted houses, the peremptory closing of a proportion of houses in a district over supplied with licences, and in some remarkable instances, even the establishment of a system of local option or local veto, both as regards the opening of new public-houses and the closing of those already in existence, all without the slightest idea of compensation.[8]

This movement was less felt in London than elsewhere[9]—the Middlesex justices did not reform their ways—"'once a public-house always a public-house,' and 'bricks and mortar commit no sin,' were favourite axioms with the Middlesex bench."[10] But over the rest of the country the results appear to have been

[1] Webb, The History of Liquor Licensing in England 44-45.

[2] The writer of an article in the Gentleman's Magazine for March 1739, cited ibid 43, says, "within those two years I was at a session held at a trading town in Wilts for licensing ale-houses, where there were seven justices, one of whose clerks told me with an air of gladness that his share came to between three and four pounds."

[3] Ibid 45. [4] Ibid 43-44, 88. [5] Ibid 51-53.

[6] Ibid 53. [7] Ibid 55-71.

[8] Ibid 49-50; how far all these measures were strictly legal is perhaps doubtful; the court of King's Bench had ruled in the case of Stephens v. Watson (1702) 1 Salk. at p. 45 that where an ale-house was licensed "the justices, to suppress it, must either proceed upon the recognisance, the condition whereof must at least be broken . . . or by indictment; and then there must be such disorders as prove a nuisance"; this is one of those cases in which the action of the justices was extra-legal and in some cases perhaps illegal, below 227, 228, 234; however that may be, the House of Lords held in the case of Sharp v. Wakefield [1891] A.C. 173 that the licensing Acts of 1828, 1872, and 1874 had given the justices a discretion to refuse the renewal of a licence on the ground of the character and necessities of the neighbourhood.

[9] Webb, op. cit. 72-79. [10] Ibid 77.

beneficial. It would seem that there was a diminution in the consumption of alcohol, especially amongst the lower classes, and a corresponding diminution in crime and disorder.[1]

From about 1816 onwards this policy of regulation began to be reversed. Dislike of the justices, the fact that this policy fostered the growth of the tied house system which gave a monopoly to the brewers, and belief in the salutary effects of free trade in all commodities—including beer, led the doctrinaire new Whigs and the Radicals to lead a crusade against the policy of regulation.[2] That crusade succeeded in effecting its object. In 1816-1817 a committee of the House of Commons reported against the exercise of any control by the justices ;[3] the justices began to reverse their policy ;[4] and in 1830 the tax on beer and cider was repealed, and the retail trade in beer was thrown completely open.[5] The disastrous consequences of this experiment in free trade were more immediately apparent than the disastrous consequences of free trade in other commodities.[6] In the course of the nineteenth century control over the sale of intoxicating drinks was gradually re-established ;[7] and it is on the basis of the statutes which re-established this control that the modern law of licensing has been built up.

All this legislation, by adding to the administrative duties of the justices, had, at the end of the century, transformed the system of local government. It had separated the judicial duties of the justices in quarter or general sessions, and the judicial duties of single or double justices, from the administrative duties of quarter or general sessions and of single or double justices. And, though, as we have seen,[8] traces still survived of the mediæval idea which made the whole of the local government of the country hinge upon the machinery of presentment and indictment, it had rendered that idea definitely obsolete. But this general legislation was not sufficient for the needs of the eighteenth century. In the first place, the autonomy of the units of local government led many places to wish for special powers to enable them to solve the particular problems of their particular district. Hence we get many local Acts which confer special powers on the organs of local government in particular places. In the second place, this desire to get special powers to solve the particular problems of particular districts, was accentuated by the rapid changes in the districts which were most affected by the industrial revolution, by the rapid growth of London and other towns which that revolution was causing,

[1] Webb, op. cit. 82-83. [2] Ibid 85-95. [3] Ibid 95-101.
[4] Ibid 101-112. [5] Ibid 113-115. [6] Ibid 116-126.
[7] Ibid 127-136. [8] Above 146-149.

by changes in methods of agriculture, and by the need for better communication which all these causes made imperative.[1] These causes made it necessary to supplement this general legislation by local legislation. To the consideration of this local legislation we must now turn.

(ii) *Local Statutes.*

In the days when travel was difficult, slow, and dangerous, and the modes of conveying news were primitive, the different units of local government had an individuality which they have lost in an age of mechanical transport and transformed methods of communication. This individuality was increased by the absence of any effective control by the central government. Local usages easily grew up; and, even though the variations may have been slight, they were easily exaggerated by local patriotism. A few capable families, or even a single capable family or individual, could set their mark on local government, in a way which is strange to a society which is standardized by general statutes, by the paid bureaucrats of the local and the central government, and by orders of departments of the central government acting under wide powers conferred upon them by the Legislature. Mr. Spencer has explained both graphically and truly the legal results of this individuality of the units of local government.[2] He says:

> Peckham, or the parish of St. Andrews Holborn, or Marylebone, wanted a watch. The old machinery of watch and ward was not only rusty and ruined, but even had it been capable of refurbishment it would have remained inadequate. These parishes did not wait until, a hundred, or ninety, or sixty years later, the national Government made up its mind that there should be a police system. Each parish applied to Parliament for power to raise a local force and obtained such power. Similarly, a Bristol philanthropist advocated the creation of workhouses. There was no pause until the country or the statesmen who governed it were convinced that workhouses were desirable institutions and should be universally provided. One parish after another applied when necessary for power to purchase land and erect, govern, and maintain such an institution, regardless of whether other parishes did or did not undertake like obligations. The inhabitants of St. James's Square or Lincoln's Inn Fields decided that the immediate neighbourhood of their residences should be lighted, paved, and adorned, and they petitioned Parliament for, and obtained, power to do so, and to rate themselves for such purposes. . . . So as the old town increased in size, and villages grew rapidly into active centres of industry, each town applied, if and when it thought fit, for an Act which allowed it to light,

[1] "There was not merely a revolution in manufacturing processes, but a revolution in agriculture, and transport; and the Inclosure Acts in the one case, and the Canal Acts, the Turnpike Trust Acts, and, later on, the Railway Acts in the other, were more than an effect of changing conditions; they were the legislative instruments by which the change was accomplished," F. H. Spencer, Municipal Origins 366.

[2] Ibid 314-315.

watch, pave, cleanse, and prevent nuisances in its streets, establish, enlarge, or transfer its market, or perform for itself some of these or some other functions which the inhabitants, or often only an influential minority of them judged to be desirable.

Hence we find that, from a very early period, localities of different kinds applied to Parliament to give them special powers to meet their special needs. There are one or two local statutes of this kind in the Middle Ages ;[1] they are more numerous in the Tudor and Stuart period ;[2] and, during the eighteenth century, they gradually come to outnumber the general statutes.[3] The enormous increase of this local legislation in the last half of that century is due to the urbanization of the country which was the necessary sequence of the industrial revolution. The best proof of this fact is the character of the powers which these Acts confer upon many different bodies. On this matter I cannot do better than copy Mr. Spencer's description. He says :[4]

> Besides the two great classes of Inclosure Acts and Turnpike Trust Acts, there are Acts dealing—always for particular localities, often for a term of years only, and frequently in widely different ways—with paving, lighting, watching, cleansing, sewers, nuisances, and encroachments—a most comprehensive heading—fire prevention and extinction, building regulation, street traffic, street improvements, docks, harbours, canals, river navigation, markets, theatres, regulations of all kinds including buying and selling, and the use of weights and measures, the licensing of hackney coaches, water supply, the provision of churches, the salaries of incumbents, burial grounds, local finance in almost every aspect (including loans, rates, dues, and tolls), gaols, houses of correction, municipal and county buildings, local areas, poor relief and the Poor Law administration generally ; in short, all the functions of local government which already existed or arose during the period we are considering.

Of the distinctions, formal and substantial, between public general Acts on the one hand, and these local Acts on the other, I shall speak in the following chapter.[5] It is sufficient at this point, to say that the mass of local bills which were brought before Parliament, necessitated a special procedure to deal with

[1] E.g. 31 Edward III St. 2 c. 2—regulation of the Yarmouth fisheries ; 21 Richard II c. 18—beacons and fortifications of Calais ; 9 Henry V c. 11—regulation of the roads near Abingdon.

[2] E.g. 21 Henry VIII c. 11—paving the Strand : 25 Henry VIII c. 8—paving Holborn and Southwark ; 2, 3 Edward VI c. 38—paving Calais ; 13 Elizabeth c. 24—paving Ipswich ; 18 Elizabeth c. 19—paving Chichester ; 3 James I c. 24—paving Drury Lane ; see the lists of Acts classified as local in the index to the Record Comm. Ed. of the statutes.

[3] The following statistics are given by Mr. Spencer, Municipal Origins 312 : in 1701 there are three local Acts, in 1702 five ; in 1703 one ; in 1750 there are nineteen local as against twenty-one general Acts, in 1751 twenty-nine as against thirty-nine, in 1752 thirty-four as against twenty-six ; from that time local Acts are in a majority —e.g. in 1770 there are sixty-five local as against forty-nine general Acts.

[4] F. H. Spencer, Municipal Origins 115-116.

[5] Vol. xi 288-300.

them ; and that it is for this reason that the foundations of the elaborate private bill procedure of both Houses were being laid in this period.[1] But there is another result of this great increase in local legislation with which we are concerned at this point, because it had a very direct effect upon the new system of local government which was arising in this century. Earlier local Acts generally gave special powers to the existing authorities of the counties or the boroughs. The majority of the local Acts of the eighteenth century created new and special statutory bodies to perform the functions prescribed by the Acts. Hence this local legislation falls into two well-defined parts—Acts which gave new powers to existing local authorities, and Acts which created *ad hoc* bodies.[2] It is the first of these classes of Acts that we must now consider.

We have seen that these Acts have been known from very early periods.[3] During the eighteenth century they continued to be passed at the instance generally of vestries or towns, and sometimes at the instance of the county justices of the peace. Let us look, first, at the character of the Acts passed at the instance of these three sets of local government authorities ; and secondly, at the structure of the Acts which conferred powers upon these bodies.

Many vestries got local Acts which gave increased powers to manage a workhouse, to employ the poor, to teach and apprentice children, to deal with vagrants, and to levy rates. Sometimes these powers were given to the churchwardens and overseers, sometimes to a body elected by the vestry.[4] Others got Acts which enabled them to pay watchmen to guard the streets at night, and to pave, cleanse, and light the streets. The need for such powers in the crowded suburban districts of London was so evident, that vestries generally found little

[1] Vol. xi 326-348.

[2] Occasionally the number of the members of the existing local authorities, who were ex officio members of the *ad hoc* body, must have caused the *ad hoc* body to differ little in its constitution from that of the local authorities, see e.g. 6 Anne c. 46—an Act to erect a workhouse in the borough of Plymouth ; the *ad hoc* body incorporated to manage the workhouse consisted of the mayor and recorder, six magistrates of the town, six of the common council of the town, and forty-two persons elected from two parishes ; they are therefore much the same persons who acted as members of the governing body of the town and its constituent vestries ; similarly, in the case of local Acts got by London vestries, " The Churchwardens and Overseers are nearly always ex officio members, and frequently also the Rector or Vicar, together with a prescribed number of ' substantial and discreet persons,' elected by the inhabitants in Vestry assembled, or by the Close Vestry itself," Webb, Statutory Authorities 145 ; the theoretical distinction between the two sets of bodies is of course clear ; and the powers given to the two sets of bodies tended to differ, see below 208, 214, 216.

[3] Above 189 nn. 1 and 2.

[4] Webb, Statutory Authorities 144-146.

difficulty in getting the powers which they wanted. This was the experience of a Marylebone vestry in 1755 :

> In April 1755, the vestry asks a committee to " consider of the Heads of a Bill to be presented to Parliament for establishing a Nightly Watch, Paving, Cleansing and Enlightening the Streets, etc., in the parish." . . . The Bill is drawn up and approved; the committee is asked to supervise its promotion. In order that all local influence may be enlisted the churchwardens are empowered to add to the committee at their discretion. The local member (a Knight of the Shire of Middlesex) is obtained to act as sponsor to the Bill in Parliament, and a legacy left to the vestry for some *other* purpose is ordered to be used to defray the expenses of promotion, the loan to be repaid out of the first moneys raised under the Act. In December leave is obtained to introduce the Bill into the Commons. Within three months more the Royal Assent has been given, and the Duke of Portland, the Earl of Warwick, and the two Knights of the Shire for Middlesex are thanked " for their great pains and trouble in obtaining the Act of Parliament ".[1]

We have seen that the vestry of St. George's Hanover Square, by the help of a series of local Acts, made itself a model of parochial efficiency.[2] But local Acts were not always so easily obtained. If these Acts were promoted by influential outsiders for social or business reasons, they were sometimes opposed by the vestry ; [3] and, similarly, vestries would sometimes oppose the proposals of municipal corporations to take extra powers. In 1790, for instance, a vestry successfully opposed a proposal of the corporation of Liverpool to get a paving Act and rating powers, because it thought (erroneously) that the corporation was under a legal obligation to pave the streets out of its own funds.[4]

Most of the local Acts passed at the end of the seventeenth and the beginning of the eighteenth centuries were passed in order to give increased powers to the governing bodies of towns. Later, the Legislature more often gave these powers to statutory bodies of improvement commissioners. But, all through the century, there are examples of Acts which gave these powers to the governing bodies of towns. Thus four Acts gave to the city of Bristol powers over the Avon and Frome, and powers to pave, light, watch, and cleanse the town, and to regulate the market ; [5] and Yarmouth [6] and Bridport [7] were given control over their harbours and docks.[8] Mr. Spencer has given the following instances of similar powers given to the governing bodies of other towns : [9]

[1] Spencer, Municipal Origins, 12-13.
[2] Above 143.
[3] Spencer, Municipal Origins 13-14.
[4] Ibid 42-44.
[5] 11, 12 William III c. 23 ; 28 George II c. 32 ; 6 George III c. 34 ; 28 George III c. 65 ; Spencer, Municipal Origins, 162-163.
[6] 10, 11 William III c. 5 ; 7 George I c. II.
[7] 8 George I c. 11.
[8] Spencer, Municipal Origins 168.
[9] Ibid 163.

The Town Council of Bath obtained power to organise a watch and to exercise some street regulation.[1] Similarly lighting and watching powers were entrusted to the Town Council of Exeter.[2] The Town Council of Hull was the street cleansing authority for a time.[3] In York the Council was the authority for lighting, cleansing, and licensing coachmen.[4] Similarly in Newcastle-on-Tyne,[5] Doncaster,[6] Gloucester,[7] various powers chiefly of a fragmentary nature, were bestowed upon the municipal corporation. In Liverpool the powers of the Corporation were more extensive, including the regulation of the streets, the supply of water, sewers, and slaughterhouses, the provision of a fire police, and power to effect street improvements.[8]

But it would seem that it was seldom that the powers conferred upon the governing bodies of the cities or boroughs were so extensive as those conferred upon the *ad hoc* bodies of street or improvement commissioners.[9]

There are not so many local Acts giving additional powers to the county justices—these Acts were not so necessary in rural areas. The chief matter in which the Legislature found it necessary to supplement the powers of the county justices by local Acts was road maintenance. There are several local Acts of the sixteenth and seventeenth centuries, which give these powers to the justices of particular counties or to particular divisions of counties.[10] In 1663 special powers were given to the quarter sessions of the counties of Hertford, Cambridge, and Huntingdon to raise money for the repair of the Great North Road, by the levy of tolls at certain specified places;[11] and at the end of the seventeenth and the beginning of the eighteenth centuries there are several instances of similar local Acts.[12] But "suddenly the course of legislation changes. After 1711 Parliament no longer resorted to the county justices for its new road authorities."[13] Instead, it created special statutory bodies to look after particular stretches of road. We find Acts of this kind in 1706, 1709, and 1710. They are the forerunners of a long series of statutes which created the set of *ad hoc* bodies known as The Turnpike Trustees.[14] With these bodies I shall deal under the following head.[15] But before I deal with these *ad hoc* bodies we must look at the structure of the Acts which conferred these additional powers on the local authorities.

[1] 30 George II c. 65. [2] 1 George III c. 28; 46 George III c. 39.
[3] 2 George III c. 70. [4] 3 George III c. 48.
[5] 26 George III c. 39. [6] 43 George III c. 147.
[7] 1 and 2 George IV c. 22. [8] 26 George III c. 12; 7 George IV. c. 57.
[9] Spencer, Municipal Origins 164, where it is pointed out that only in three cases were equally extensive powers conferred on a municipal corporation—Wisbech in 1810, Macclesfield in 1814, and Newcastle-under-Lyme in 1819.
[10] See e g. 18 Elizabeth c. 20—repairs to the bridges and highways around Oxford.
[11] Webb, Statutory Authorities, 157-158. [12] Ibid 158.
[13] Ibid 159. [14] Ibid. [15] Below 207-211.

I propose to take as illustrations two Acts, one passed at the beginning, and the other in the second half of the eighteenth century.

The first of these Acts is an Act of 1707 [1] for the repair of certain highways in the neighbourhood of Bath, for cleansing, paving, and lighting the streets of Bath, and for regulating the licensing of "glass or bath chairs." In order to provide a better machinery for keeping the roads in the neighbourhood of Bath in repair it was provided that two or more justices of the peace from the nearest parts of the counties of Wilts, Somerset, and Gloucester, and one or more justices of the peace from the City of Bath, should meet and appoint surveyors, and should, thereafter, meet four times a year to put the Act in execution. These surveyors, who were bound to serve or pay a penalty of £5, were to decide upon the measures to be taken, and the money required, to put the roads in repair. They were to certify the justices as to these matters, and the justices were to take action at their quarterly meetings. The surveyors could requisition carts and labour from persons bound by law to supply carts or labour,[2] and must pay "at the usual rate of the country"—differences on this matter were to be finally settled by three justices. Powers were given to the surveyors to dig for gravel on payment of compensation to the owners; and to the justices to take land to widen a road, on payment of compensation, provided that no house was pulled down, or garden ground taken. Power was given to set up toll gates and to appoint collectors of tolls. The amount of the tolls was fixed by the Act, and a number of exemptions for toll were also defined by it. The surveyors and collectors were to account annually to the justices for the tolls collected; and the justices could make allowances out of the toll to the surveyors and others for work done, and to the clerk of the peace for Bath for his attendance at the quarterly meetings. Power was given to a majority of the surveyors to raise an immediate capital sum by a mortgage of the tolls. This part of the Act was not to apply to streets within the City of Bath. For the repair, paving, cleansing, and lighting of these streets the mayor, recorder, and justices for the City were to appoint surveyors, who also were obliged to take office or pay a penalty of £5. Householders were to sweep the streets in front of their houses, and scavengers, to be appointed by the surveyors, were to carry away the refuse. It was made an offence to throw ashes, filth, or rubbish into the streets. Occupiers and owners must pave the street in front of their houses up to the middle of the street, and tenants who had done the paving could deduct the expenses

[1] 6 Anne c. 42.

[2] As to this obligation see above 154; below 208-209.

from their rent. For defraying expenses the surveyors could make a rate, which was to be allowed by two justices ; and the justices could appoint collectors of the rate. The surveyors and collectors were to account to the justices for the sums collected once a year. Householders chargeable with poor rates, whose houses abutted on the street, were obliged to hang out a lamp from dark to 12 p.m. between September 14 and March 25 ; but they could agree to use lamps approved by the justices ; and, in that case, the surveyors could make a rate for their erection and maintenance. Power was given to the mayor and aldermen to licence chair-men. The amounts payable for the licence, the number of chairs, and the rates of hire were prescribed. Each chair was to have its number ; and penalties were provided for the use of abusive language by chair-men, and for demanding more than the proper rate of hire.

The second of these Acts is an Act of 1766,[1] which was passed to give the mayor and corporation of Bristol power to widen old, and to open new, streets ; and to enlarge powers given by former Acts to pave, cleanse, light, water, and regulate the streets and other places in the City. Powers were given to the mayor and corporation to widen certain old streets and to build new streets in places set out in the schedules to the Act ; to take down certain sheds and houses on the banks of the Frome which impeded navigation ; to take down a church and vicarage in order to widen a street ; and to purchase compulsorily in order to effect these objects. Elaborate clauses set out the course to be pursued when the owners of the property to be acquired were persons under disability, and as to the assessment of the value of the property by a jury at quarter sessions. Power was given to sell land thus taken, if it was found not to be wanted for these purposes. It was provided that street lamps should be lighted from sunset to sunrise, and that the churchwardens, overseers, and surveyors of highways should have power to contract for the erection and maintenance of these lights. The contract was only to last for one year ; and the mayor and justices were to fix the maximum amount payable for each lamp. Power was given to make similar contracts for cleansing the streets. The churchwardens and other officials could not be in any way concerned with these contracts. Powers of paving and draining were given to the surveyors of highways, subject to the directions of the mayor and the justices ; and powers, on the presentment of a grand jury, to cleanse and repair sewers. Those benefited by the sewers must pay a rate to keep them in repair. If new streets were laid out, the owners of property fronting on the streets must pave them. There were provisions as to the weights

[1] 6 George III c. 34.

of the loaded carts, and the number of horses drawing them, which were to be allowed in the streets, and as to goods left on wharves more than twenty-four hours; and powers were given to regulate obstructions in the streets, sheds projecting over the streets, gutters, and signposts. Owners of houses presented as ruinous must repair them or pull them down. Regulations were made as to the erection of new buildings.

We shall now see that the need for new powers, to which these Acts testify, was more fully met in several different spheres of local government by the creation of *ad hoc* bodies.

(2) *The Acts which created ad hoc bodies.*

If we trace the course of English legal history back to a sufficiently early period, we come to a time when much of what has long been part of the regular machinery of law and government, takes the form of an *ad hoc* device, invented to meet a local, a personal, or a temporary need. In the twelfth century many parts of that centralized machinery of law and government, in which the common law originated, took the form of *ad hoc* devices. Commissions to itinerant justices were very much *ad hoc*, since neither their forms, nor the occasions on which they were issued, were regularized; [1] and, even after these matters had come to be fixed by statute or by custom, it did not cease to be possible to issue them *ad hoc*.[2] Royal writs, many of which afterwards come to be *de cursu*, were specially issued at the suit of particular litigants by the King's special favour, procured by the payment of large sums of money—they gave an *ad hoc* authority or direction to the courts; [3] and at first applications to King, Council or Chancellor for equitable remedies were very much in the nature of *ad hoc* applications.[4] Even the permission to have a case tried by a jury was, in those early days, in the nature of an *ad hoc* expedient procurable by a suitable payment to the King.[5]

Many of these early *ad hoc* institutions became parts of the regular machinery of the common law. But the power of the Crown to create machinery *ad hoc*, to deal with situations with which the ordinary machinery could not deal, was not lost. One illustration is the establishment in 1349, by royal ordinance, of the justices of labourers to meet the situation created by the Black Death—an institution which is one of the roots from which sprang the justices of the peace.[6] Another can be found in the

[1] Vol. i 49-51, 264.
[2] Ibid 274, 277-278.
[3] This was true of the writ of trespass up to the end of Henry III's reign, vol. ii 364.
[4] Vol. i 401, 485-486; vol. v 278 seqq.
[5] Vol. i 323; P. and M. ii 615-616.
[6] Vol. i 288.

numerous cases in which *ad hoc* commissions were issued to particular commissioners, to enquire into the condition of particular bridges, roads, rivers, weirs, causeways, or sewers.[1] All these commissions created temporary *ad hoc* authorities; and it may well be that many of these commissions, like some of the temporary and special commissions of oyer and terminer,[2] were issued on personal quite as much as on local grounds. The distinction between general exercises of governmental power and local and personal exercises, which, at the end of the mediæval period, is emerging in relation to the statutes,[3] cannot be drawn precisely at earlier periods in the history of the law.

Instances of *ad hoc* authorities which were of a permanent character can be found in some of the mediæval arrangements for the repair of bridges. "Just as 'bryggewryghtters' were appointed to maintain the causeway (and probably the bridge) at Marcham, so in 1392, after a long period of decay, the great bridge newly built at Rochester was administered by elected bridge wardens; and bridge keepers are found in the earliest municipal records of Windsor which survive of the reign of Henry VI."[4] But the most notable instance of the power of the Crown to create an *ad hoc* authority by commission is the body generally known as the Commissioners of Sewers. It is the most notable because it is by far the oldest and most permanent of these *ad hoc* authorities. We shall see that these commissions can be traced back to a very early period in the history of the common law;[5] that the machinery with which they worked is still older;[6] and that they outlived all those newer statutory *ad hoc* bodies which were created in very large numbers in the eighteenth century.[7]

The rise of the legislative power of Parliament during the fourteenth and fifteenth centuries caused Parliamentary consent to be given in some cases to the creations of *ad hoc* bodies.[8] It was beginning to be seen that more could be effected by a statute than by an exercise of the prerogative. Thus we shall see that the series of statutes which authorized the issue of Commissions of Sewers, gave power to the commissioners to issue ordinances and to see to their execution—a power which would have been of doubtful validity if based only on the prerogative.[9] There are one or two other instances of the statutory creation of *ad hoc* bodies in the sixteenth and early seventeenth

[1] For illustrations see Public Works in Medieval Law (S.S.) ii xxxv-xxxvi.
[2] Vol. i 277-278. [3] Vol. xi 288-289.
[4] Public Works in Medieval Law (S.S.) ii xxi, and the references there cited.
[5] Below 200-201. [6] Below 199-200. [7] Below 206.
[8] Below 202. [9] Below 203.

centuries ; [1] and after the Restoration there are several Acts which created *ad hoc* authorities to administer the poor law.[2] Acts creating *ad hoc* bodies for this purpose were multiplied during the eighteenth century ; [3] and in the early years of that century, there begin the series of Acts which created *ad hoc* bodies to make and administer new turnpike roads out of the proceeds of the tolls authorized by the Acts to be levied.[4] Later in the century the state of the towns and the rapidly growing urban districts,[5] led to the creation of many bodies of Improvement Commissioners, in whose organization and powers we can see, as Mr. Spencer has pointed out,[6] the origins of much of the organization and many of the powers of our modern municipalities. It may be noted that these eighteenth-century developments in the sphere of local government are closely paralleled in the sphere of judicial organization. The decline of the older local courts exercising a civil jurisdiction, and the need for cheap tribunals of this kind, led to the creation in very many places of courts of Request, which were essentially new *ad hoc* courts, created to meet the need created by the breakdown of the older communal, feudal, manorial, and franchise courts.[7]

The reason for the creation of all these various *ad hoc* bodies was the fact that the existing machinery of local government, like the judicial machinery, was insufficient to deal with the special needs of particular localities. The fact that some parts of England are exposed to incursions of the sea, and that these and other parts are exposed to floods, if provision is not made for drainage, are reasons why, from the earliest period to our own days, it was and is necessary to make special provisions for those districts by commissions of sewers or otherwise. As the editor to the second edition of Robert Callis's Reading on Henry VIII's statute of sewers says : [8]

[1] E.g. 1 Henry VIII c. 9—two or three persons assigned by the Lord Chancellor to collect the tolls and repair the bridge at Staines ; 6 Henry VIII c. 17—an *ad hoc* body, which included the mayor of Canterbury, the archbishop, the mayor of Sandwich, and two or three justices of the peace for Kent, appointed to see to the deepening of the river passing through Canterbury ; 2, 3 Phillip and Mary c. 16—provision made for the appointment of eight overseers of watermen on the Thames ; 18 Elizabeth c. 17—provision made for the appointment of two wardens and twelve assistants to see to the repair of Rochester bridge ; 3 James I c. 20—eighteen commissioners to clear the upper part of the Thames so as to provide free passage of boats to Oxford.

[2] Below 212.

[3] Below 213.

[4] Below 207, 209.

[5] Below 215-216.

[6] Municipal Origins 322 ; Webb, Local Government, Statutory Authorities 235-236 ; below 215 ; as Mr. Spencer says, op. cit. 309, " this legislation represents the first efforts of a community undergoing a very rapid economic development to provide itself with local institutions suitable to its changing industrial organization."

[7] Vol. i 190-191.

[8] The Reading of Robert Callis (2nd ed. 1685) Preface.

> The Laws of Sewers . . . are of general concernment, as well to inland counties through which rivers run, as to maritime, and their use and importance is such, as without the due execution of them, we should be exposed to the rage and violence of that merciless element which surrounds us. Rivers would by impediments and annoyances be obstructed in their courses; bridges, calceys, havens and ports would fall to decay; in a word, the gates which now open and let in commerce, and the ways that convey and lead it through the kingdom would fail us.

Permanent natural causes created the necessity for these commissions; and this is the reason why, as I have said, the *ad hoc* authorities created by these commissions have had by far the longest history of any of these bodies. The creation of the three other chief varieties of these authorities was rendered necessary by the emergence of new social and economic problems. As the passage cited from Callis indicates, commerce demands good means of communication. The increasing commerce of the country created an urgent need for better means of communication than those which the existing machinery for maintaining the highways could supply [1]—hence the creation of the turnpike trusts; [2] and this need was much accentuated in the latter half of the eighteenth century by the beginnings of the industrial revolution. That same revolution gave an enormous impetus to the organization of industry upon a capitalistic basis. This new organization, coupled with the weakening of the control of the central government, which was a consequence of the victory of Parliament, had caused in many places at the latter part of the seventeenth century, a breakdown of the Elizabethan machinery for the relief of the poor.[3] It was for this reason that these places asked Parliament to create new machinery to deal with the problem of pauperism; and that this new machinery took the form of *ad hoc* bodies with large statutory powers.[4] Moreover, the industrial revolution brought into existence many new urban and suburban districts, for which the existing machinery of local government, because it was adapted only to the needs of rural districts, was wholly insufficient—hence the creation of bodies of improvement commissioners.[5]

We shall now see that the legislation which created these four bodies of *ad hoc* authorities has been one of the most powerful influences in adapting the semi-mediæval system of local government, which the eighteenth century inherited, to the needs of a modern and an industrialized state.

[1] Above 171-172. [2] Below 207. [3] Vol vi 349-51; above 175-177.
[4] Below 211-214. [5] Below 214-219.

The Commissioners of Sewers.[1]

At different places around the coasts of England there are stretches of low-lying land, which require the protection of embankments to preserve them from incursions of the sea, and careful and elaborate drainage to prevent them from being water-logged by the rivers which flow through them to the sea. The physical geography of England has set these problems to its inhabitants at all periods in its history. It is for this reason that, as Callis points out, "The laws of sewers have been and be of great antiquity, and have told over as much time and as many years as any other laws of this realm have done"; [2] and it is for this reason that the machinery for dealing with this problem, and the body of law which has resulted from the working of this machinery, have been remarkably permanent.

Far back in the days before the advent of the common law, the communities which inhabited the many low-lying districts, developed primitive machinery and local customs to deal with the problem which nature had set them. "A special code of laws for marshes existed as early as the reign of Henry I, for King John ordered his sheriff to add to a jury dealing with a dyke in Essex men who knew the Marsh Law of the days of his great-grandfather"; [3] and in different places many special local customs regulated the management of particular sewers.[4] In the parts of the fen country which lie around the Wash, elaborate local customs determined the liabilities of communities and landowners for the repair of embankments and the cleansing of sewers, which represent customary arrangements of great antiquity.[5] The duty of repairing the embankments was generally laid upon the adjoining vills and landowners.[6] Special dike reeves, wall reeves or other similar officers were appointed to see that the work was done.[7] The ancient fines for the breach of the obligation of communities or landowners—fines called by the archaic names of by-lawe, biscot, triscot, and wopenny—

[1] A sewer was defined by Callis, Reading (2nd ed.) 80 as "a freshwater trench compassed in on both sides with a bank, and is a small current or little river"; as the Webbs point out, Statutory Authorities 105 n. 1, it was the general adoption of water closets between 1800 and 1840 which gave to the term sewer "its present malodorous meaning."

[2] Reading, 23. [3] Public Works in Medieval Law (S.S.) ii xxvii.

[4] "It is clear that there were a number of established customs in connection with sewers. Near Swineshead the river Bicker had to be open all the year, while the sewers between Holland and Kesteven had to be kept open from March to November only. In the same county it was customary to view the marsh ditches once a year, on St. Andrew's day. The Bourn Eau ought, according to custom and the ordinance of the justices of sewers, to be cleansed every fourth year from Pinchbeck to the sea," ibid xxvii-xxviii.

[5] Neilson, A Terrier of Fleet Lincolnshire (British Academy) xvii-xviii, xxii-xxiii.

[6] Ibid xvii, xxii, xliv-xlvi. [7] Ibid xlvi, lviii.

testify to the antiquity of these local customs of the Lincolnshire fens ;[1] and there were many customary regulations as to the taking of earth for dikes and as to the ejectment of non-commonable animals near the dikes.[2] In Romney Marsh we shall see that the records of the thirteenth century reveal a well-established body of twenty-four sworn jurats of the marsh, later known as the Lords of the Marsh, for the maintenance and repair of the work needed to drain it and to protect it from the incursions of the sea.[3] It was upon the foundation of this local machinery and these local customs that the commissions of sewers, which began to be issued in the thirteenth century, built up the machinery and the law which survive in a modified form to-day [4]—just as it was upon the foundation of the local customs of particular districts that the King's judges laid the foundations of the common law.

We have seen that in the latter part of the twelfth and in the thirteenth centuries royal justices, who travelled round the country with many various commissions, played a great part in the creation of a common law.[5] Similarly it was the work of a particular set of these justices, acting under a particular commission—the commission of sewers—which played a great part in the creation of the organization responsible for the work of draining and embanking the marsh lands, and therefore in the creation of the laws on this subject. The commission of sewers was in its origin a special commission of oyer and terminer.[6] It was a commission of this kind which was issued to Henry de Bathe in 1257 to settle the disputes which had arisen between the twenty-four sworn jurats and the men of Romney Marsh.[7] A commission issued in 1258 is the first of the specialized commissions of sewers ; and such commissions continued to be issued throughout the Middle Ages.[8] A second commission to deal with

[1] "By-lawe was the penalty for neglecting the first summons to repair an endangered defence. . . . Biscot was the penalty for failure to appear at the second summons, and was double the by-lawe in amount, and triscot was paid for failure to attend at the third summons and was three times the by-lawe in amount. Wopenny was a penny taken by the person distraining for each distress," Neilson, A Terrier of Fleet Lincolnshire (British Academy) xlvi.

[2] Ibid lviii.

[3] Below n. 7.

[4] Below n. 8, 201.

[5] Vol. i 49-51, 264.

[6] Second Report of the Royal Commission on Public Records (1914) App. II no 12, pp. 98-100—a note on the constitution and records of commissions of sewers by H. G. Richardson ; forms of the commission are to be found in the Register of Writs (ed. 1531) f. 127*a*, and in Fitzherbert, Natura Brevium ff. 113-114.

[7] Second Report of Royal Commission on Public Records App. II p. 98. These and the later proceedings concerning Romney Marsh have been frequently printed under the title of "The Charter of Romney Marsh or the Laws and Customs of Romney Marsh" ; my references are to the edition of 1686.

[8] "The first Commission of Sewers entered upon the Patent Rolls would appear to be one of 42 Hen. III, and this year may be taken as the date when the Commission of Sewers assumed distinct form, since the Commission issued in the previous year to Henry de Bathe, in pursuance of which he promulgated an 'ordinance' dealing with the measures to be taken to defend Romney Marsh, was one of Oyer and Terminer," Second Report of Royal Commission on Public Records App. II p. 98.

Romney Marsh was issued in 1288 to John de Lovetot and Henry de Appledonfield,[1] and a third commission in 1329 to William de Walleyns and others, to settle further questions which had arisen in respect to the marsh.[2] This was followed by a fourth commission in 1365 to Thomas Lodelow, Robert Belknap, and Thomas Culpeper, which resulted in the making of further regulations.[3] During the same period many other commissions were issued to deal with sewers in other places. But commissions issued to settle the questions which arose in relation to Romney Marsh were the most important, because they produced a set of rules as to the powers of the commissioners in relation to that district, which were taken as a model for other districts. From the end of the fourteenth century onwards, the laws of Romney Marsh were accepted as a model code for sewers—in somewhat the same way as the laws of Oleron were accepted as a model code of maritime law.[4] Thus, in 1391 those laws were applied in the fen districts of Lincolnshire ;[5] and, as we shall see,[6] they were referred to as a guide to the proceedings of the commissioners of sewers in the statutory commissions which were issued from 1427 onwards. As the Webbs have pointed out:[7]

> It is one of the minor paradoxes of English Local Government that the Lords of the Level of Romney Marsh, whose reorganization in 1258 by Sir Henry de Bathe became a starting point for subsequent reorganizations of local Courts of Sewers all over the country ; whose " Laws and Customs " were specifically adopted as the model for all other Courts, and were eventually made the basis of the celebrated Statute of Sewers, should never themselves have come under that statute, or been included in any Commission of Sewers from the Lord Chancellor. The Lords of the Level continue to-day,[8] as they were in 1689-1835, an ancient relic of pre-statutory local government.

The closest parallel is the existence of the court of the Lord Warden of the Cinque Ports, which is " the type and original of all our Admiralty and maritime courts," side by side with the general admiralty jurisdiction of the High Court.[9]

These commissions of sewers, without disturbing the local organization for the protection and drainage of the marsh lands,[10]

[1] Charter of Romney Marsh 38. [2] Ibid 54.
[3] Ibid 56. [4] Vol. i 527.
[5] Neilson, A Terrier of Fleet (British Academy) lvi n. 2.
[6] Below 202. [7] Statutory Authorities 38-39.
[8] That is in 1922 ; see now the Land Drainage Act 1930, 20, 21 George V c. 44.
[9] Vol. i 532.
[10] See Webb, Statutory Authorities 40-43, 47, 53-56 ; ibid at p. 68 it is said of the Greenwich commission that the commissioners, in spite of the legal phraseology of their commission, were " not so much a judicial tribunal superseding the primitive organization of the denizens of the marsh, as a standing committee of the principal among them, tacitly permitting the ancient customs to continue, and exercising as a court little more than occasional friendly superintendence over the work done by the jury of their less wealthy tenants and neighbours, to whose proceedings they lent

created a centralized machinery for their administration. By means of it juries assessed those liable for the costs of the upkeep of embankments and sewers. By means of it also laws and ordinances were made for the marsh; and these laws and ordinances gave precision to local customs, and in time to a generalized body of law. In the local organizations, and in the centralized machinery super-imposed upon them, we can see the two different strata of old customary law and new royal justice—just as in the leet jurisdiction we can see the two strata of the old machinery of the frankpledge and the new royal machinery of the jury of presentment.[1]

From 1427 onwards commissions of sewers were issued by statutory authority. This change was probably due to the increase of the power of Parliament, and more especially to the recognition of the fact that any powers beyond the powers which the King could give at common law should have the sanction of Parliament. The statute of 1427 [2] empowered the commissioners to survey the "walls, ditches, gutters, sewers, bridges, causeways, wears and trenches"; to enquire by whose default they were out of repair; to compel those liable for these repairs to contribute to their repair in proportion to the quantity of their holdings; to hire workmen to do the repairs; and "to make and ordain necessary and convenient statutes and ordinances for the defence and safety of the said sea banks and marshes, and the parts adjoining, according to the laws and customs of Romney Marsh, and to hear and determine according to the law and customs of our realm of England, and the customs of Romney Marsh, all and singular the premises, as well at our suit as the suit of any other that will complain before you on this behalf." In 1429 the commissioners were empowered to put their statutes and ordinances in force.[3] In 1439, 1444-1445, 1472, 1488-1489, and 1514-1515 similar statutes were passed.[4] All these statutes were superseded in 1531-1532 by a statute which is the beginning of the modern law on this subject. On this, as on many other topics, the legislation of Henry VIII's reign marks the close of the mediæval and the beginning of the modern law.

The essential provisions of this statute [5] are as follows: Commissions of sewers were to be directed into all parts of the realm to substantial persons nominated by the Lord Chancellor, the

the requisite legal authority"; "in a considerable number of districts, the Commissioners found the local community already organized for the purpose of defending the marsh land; in some districts the Commissioners set up a form of local administration on the lines of that already existing in other places," Second Report of Royal Commission on Public Records App. II 99.

[1] Vol. i 76-78. [2] 6 Henry VI c. 5. [3] 8 Henry VI c. 3.

[4] 18 Henry VI c. 10; 23 Henry VI c 8; 12 Edward IV c. 6; 4 Henry VII c. 1; 6 Henry VIII c. 10.

[5] 23 Henry VIII c. 5.

Lord Treasurer, and the two Chief Justices.[1] A property qualification was fixed for these "substantial persons," and they must take an oath of office.[2] The form of the commission was set out in the statute.[3] It gave power to the commissioners to survey embankments, sewers, "and other defences by the coasts of the sea and marish ground"; to enquire by means of a jury into defaults and annoyances and to remove such defaults and annoyances; to assess those liable to contribute to repairs; to repair works; to appoint bailiffs, surveyors, collectors, expenditors, and other officers; to take carts, horses, labourers and material paying therefor a reasonable price; to make statutes and ordinances "after the laws and customs of Romney Marsh or otherwise"; and to hear all disputes "as well at our suit as at the suit of any other." These powers conferred by the commission were confirmed by the statute.[4] It was further provided that if landowners did not pay the charges assessed upon them, the commissioners could sell the land and give a good title to the purchaser, provided that the order for sale was assented to by the Crown.[5] Such orders were to bind the land—Crown lands as well as the lands of private persons.[6] Wages were payable to the commissioners and their clerks, and they were given power to fix the remuneration of their officers.[7] Commissions were to last three years unless sooner superseded;[8] and the decrees and orders of the commissioners were to be binding during the duration of the commission, unless they had been certified into the Chancery and assented to by the King, in which case they were to be perpetual.[9] Later statutes made a few small modifications. In 1549 the statute was made perpetual, and the duration of the commissions was extended to five years.[10] Their duration was extended to ten years in 1570;[11] and it was provided in the same statute that the orders of the commissioners should remain in force after the expiration of the commission, though the royal assent had not been given to them.[12] After the expiration of a commission the justices of the peace were given power to execute it for a year, or till another commission was issued.[13] In 1605 the powers of the commissioners were extended to non-navigable streams falling into the Thames within the limits of two miles of the City of London;[14] and in 1708 the power to sell land for non-payment of assessments was extended to copyholds.[15]

During the sixteenth and early seventeenth centuries the

[1] § 1. [2] §§ 5 and 10. [3] § 2. [4] § 7.
[5] § 8. [6] § 9. [7] § 13. [8] § 16.
[9] § 17. [10] 3, 4 Edward VI c. 8. [11] 13 Elizabeth c. 9 § 1.
[12] Ibid. [13] §§ 2 and 3. [14] 3 James I c. 14.
[15] 7 Anne c. 33.

interpretation of these statutes by the courts had given rise to a certain number of general rules of law. The decisions in certain of these cases reported by Coke,[1] and the *Reading* of Callis,[2] are the foundations of the modern law. It was held from the first that the powers of the commissioners were subject to the control of the common law courts. They could be controlled by the prerogative writs ;[3] they could be indicted in cases where other public bodies were liable to indictment ;[4] and they were liable to be sued by any person who was damaged by tortious acts committed by them.[5] On the other hand, the courts put a wide interpretation on their power to make laws and ordinances—they were not, it was held, strictly bound to follow the laws and customs of Romney Marsh.[6] In one respect, however, the courts were inclined to restrict their powers—they could repair old works, but they could not make new works—if new works were wanted they should be made by the consent of those liable to contribute, or application should be made to Parliament.[7] It was not till 1833 that a modified power to make new works was conferred on the commissioners.[8] Questions as to what was a sewer within the meaning of the Acts,[9] and as to the proper mode of assessment,[10] also gave rise to litigation by means of which the law on these points was elucidated.

In the constitution and working of these courts of the commissioners of sewers two features are noteworthy. In the first place, the clauses of the statutes which fixed the qualification

[1] 10 Co. Rep. 137*b*-143*a*.

[2] Delivered in 1622, first published in 1647, and frequently republished and re-edited.

[3] Coke, Fourth Institute 276; The King v. Smith and others (1670) 1 Lev. 288 ; Case of Cardiffe Bridge (1701) 1 Salk. 146.

[4] The King v. Commissioners of Sewers for Pagham (1828) 8 B. and C. at p. 36, *per* Bayley J.—" if they made unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention, to injure the owner of other lands, they would be amenable to punishment by criminal information or indictment " ; Halsbury, Laws of England (1st ed.) xxv 788.

[5] Jones v. Bird (1822) 5 B. and Ald. 837.

[6] Keighley's Case (1610) 10 Co. Rep. at f. 140*a*.

[7] The Case of the Isle of Ely (1610) 10 Co. Rep. 141*a* ; Coke said at f. 142*b*, " when new inventions are proposed . . . if they are apparently profitable no owner of the land then will deny to make contribution for his advantage ; and then it ought to be made by their voluntary consent. . . . And if any such new invention is in truth (*quod raro aut nunquam fit*) good for the commonwealth, and yet no consent can be obtained for the making of it, then there is no remedy but to complain in Parliament " ; this view was controverted by Callis, Reading 92-105, and in 1615 the Privy Council made an order declaring that the commissioners had this power, see the order printed *in extenso* ibid 98-102 ; but, as might be expected, the common law courts—after the Rebellion followed Coke's view, Reg. v. Inhabitants of Westham (1703) 10 Mod. 159 ; Webb, Statutory Authorities 23 n. 1.

[8] 3, 4 William IV c. 22 § 19 ; Webb, loc. cit.

[9] Yeaw v. Holland (1770) 2 W. Bl. 717 ; Dore v. Gray (1788) 2 T.R. 358.

[10] The Case of the Isle of Ely (1610) 10 Co. Rep. at f. 143*a* ; Callis, Reading 114 seqq. ; Case of the Level of Hull (1740) 2 Stra. 1127.

for the commissioners [1] ensured that, except in urban districts, they should be landowners. For that reason the development of these commissioners is very similar to the development of the justices of the peace—" the judges and other professional lawyers who figure largely in the early commissions are, in the modern period, displaced by local residents, whose qualification is one of property." [2] In the second place, the commissioners were left very free to execute their commissions as they pleased. Like the other organs of local government, they had a large discretion as to the machinery which they employed. Hence in different parts of England very different kinds of machinery were evolved. In the rural districts of East Kent,[3] in Lincolnshire,[4] and in Somerset,[5] the old machinery was still used. Standing bodies of local jurors supervised the sewers and embankments and made provision for their repair; and the powers and legal status of these ancient bodies appeared strange to the judges in the nineteenth century, since they could find no legal warrant for juries of this kind.[6] In the urban districts of Westminster and north London the jury was gradually ousted, and the work of the commissions was done by those commissioners who chose to attend.[7] At the beginning of the nineteenth century the deterioration of these bodies had set in. In the seventeenth century the Westminster commission was an efficient body of high court officials; [8] but in the course of the eighteenth century it came to be filled by persons of lower social status,[9] and eventually fell into the hands of the same corrupt clique of justices of the peace as ran the Middlesex quarter sessions; [10] and many other metropolitan courts of sewers tended to go the same way.

The Tower Hamlets and Holborn and Finsbury, districts already covered by suburban streets, were governed, like Westminster by Courts of Sewers, in which the principal part was played by the Commissioners themselves. Moreover, as the whole area governed by these Courts of Sewers became more densely populated, we find them all slipping more or less into the habits of the Westminster Court—reaching, too, at one period or another, much the same depth of inefficiency, if not of corruption.[11]

The later history of the courts of those commissioners of sewers also presents some analogies with the later history of local government in general. For urban centres a new code of municipal government was established by the Municipal Corporations

[1] Above 203.
[2] Second Report of Royal Commission on Public Records App. II p. 99.
[3] Webb, Statutory Authorities 45-57. [4] Ibid 51-56. [5] Ibid 39-45.
[6] The King v. Commissioners of Sewers for Somerset (1805) 7 East 71; see the custom stated at pp. 72-73; there were similar juries in East Kent, Webb, op. cit. 46-48.
[7] Ibid 72-74, 85. [8] Ibid 69-75. [9] Ibid 75-82.
[10] Ibid 82; above 143. [11] Webb, op. cit. 85.

Act of 1835 ; [1] but for rural districts the governmental powers of the justices of the peace lasted till 1888.[2] Similarly the London commissions of sewers were superseded,[3] and their powers were handed over, by the legislation of the first half of the nineteenth century, to various statutory bodies,[4] and have at length become vested in the London County Council ; [5] whereas the powers of the rural commissions continued till 1930.[6] The law as to these commissions, which was laid down by Henry VIII's statute and the statutes which amended it, was restated with modifications and additions in 1833 ; [7] and the procedure to be followed in order to obtain a commission was laid down by the Land Drainage Act, 1861.[8] But the commission when issued still followed the form set out in Henry VIII's statute.[9] To the end commissions were in practice always issued under the statutes of Sewers, though, in theory, they could have been issued by virtue of the King's prerogative.[10] The commissions defined the area of the commission, and the jurisdiction of the commissioners ; but they could not affect London, or districts governed by local Acts, or districts such as Romney Marsh, which continued to be governed by local custom.[11] Until 1930 we could see, in these rural commissions of sewers, *ad hoc* bodies, acting under the authority of a royal commission which, in its form, went back to the earliest days of the common law ; which could employ machinery which existed before the common law ; which had had a longer life than those other more general commissions, which once gave to the itinerant justices a jurisdiction almost as extensive as that of the courts of common law.[12] There was no institution in English legal history which could show so long and so continuous a history as these commissions of sewers and the machinery which they employed.

We must now turn to the consideration of other *ad hoc* bodies, which were constituted to deal with social and economic problems arising out of the development of the English state. As we shall now see, these *ad hoc* bodies are relatively modern in their origin, and have had much shorter lives.

[1] 5, 6 William IV c. 76. [2] 51, 52 Victoria c. 41.
[3] Second Report of Royal Commission on Public Records App. II 99.
[4] Webb, op. cit. 106.
[5] "It is one more example of the complicated evolution of English Local Government that we should have to recognize, as the ancestors of the largest, the most democratic in form and the most powerful of the world's great city governments, both the little knot of Court officials who after the Restoration met in Westminster Hall, and the groups of peasant farmers, who in the grey morning mists, had, time out of mind, walked the marshes of Wandsworth and Greenwich," ibid 106.
[6] The Land Drainage Act 1930, 20, 21 George V c. 44.
[7] 3, 4 William IV c. 22. [8] 24, 25 Victoria c. 133.
[9] Halsbury, Laws of England xxv 774 n. (*m*).
[10] Ibid 774. [11] Ibid 774 n. (*m*). [12] Vol. i 281.

The Turnpike Trusts.[1]

Of all the four classes [2] of *ad hoc* bodies the turnpike trusts were the most numerous. The following are the figures given by the Webbs :

> Of Courts of Sewers in England and Wales there may have been, at one time or another during the eighteenth century, a hundred or so. Of Incorporated Guardians of the Poor we have particulars of about 125. Of separate bodies of Police or Improvement Commissioners . . . nearly three hundred may be enumerated. But of Turnpike Trusts, from the beginning of the eighteenth century . . . there came to be, by 1835, over 1100 simultaneously in existence ; or twice as many as all the other Statutory Authorities put together. The Turnpike Trusts were, in the first quarter of the nineteenth century, about five times as numerous as the Municipal Corporations, and nearly twenty times as numerous as the Courts of Quarter Sessions that governed the Counties.[3]

There were two main reasons for the great increase of these trusts during the eighteenth century. First, the inadequacy of the parochial machinery and resources [4] for maintaining main roads, fit to stand the new traffic, to which an expanding commerce was giving rise ; and, secondly, the feeling that it was fair that those who had the benefit of the road should pay for its upkeep. Therefore, from the time of the Restoration, Parliament adopted the device of giving statutory powers to certain bodies of persons to charge tolls, and to use the money to repair and maintain the road.[5] We have seen that those bodies were at first the justices of the peace ; but that after 1711 Parliament ceased to give these powers to the justices, and gave them instead to *ad hoc* bodies of trustees.[6]

In theory these bodies of turnpike trustees were temporary bodies—the usual term for which the Act created them was twenty-one years.[7] The theory was that the trust was " only a temporary device, designed to cope with the exceptionally ruinous state into which a bit of road had fallen." [8] No doubt the temporary character of these Acts, and especially the power sometimes given to the justices in some of the earlier Acts, to bring the Act to an end when the road had been repaired,[9] helped to prevent opposition. But they were far from being temporary. The term was always renewed so that they came to be permanent bodies. In fact, the power given by these Acts to raise by a loan, on the security of the tolls, the money needed to repair and maintain the roads, made it necessary that they should be permanent.

[1] Webb, The Story of the King's Highway chaps. vii and viii ; Statutory Authorities chap. iii.
[2] Above 198.
[3] Statutory Authorities 152.
[4] Above 171-172.
[5] Statutory Authorities, 156-158.
[6] Above 192.
[7] Statutory Authorities 161.
[8] Ibid 162.
[9] Ibid 163.

Otherwise the trustees would not have been able to offer adequate security to the lenders.

The Acts gave powers to construct and maintain a certain piece of road, to levy certain tolls, and to borrow money on the security of the tolls. Powers were given to employ servants, to purchase material, and to erect toll gates and toll houses. The maximum tolls were specified, and generally certain exemptions in favour of certain persons or classes of persons were given.[1] These powers were given to a body of trustees named in the Act. In order to avoid opposition all the influential persons in the district were included, so that the trustees might be a body of two or three hundred persons.[2] The result was that, when the meetings of the trustees were summoned, there was either a large and sometimes tumultuous meeting, at which no business was done, or no trustees attended.[3] In some cases the whole management devolved on a few persons, who seized the opportunity to do jobs for themselves or their friends.[4] In other cases it devolved on the treasurer who was generally one of the trustees. He appointed the surveyor—often a small tradesman who knew nothing of road making; and the surveyor engaged and paid the workmen.[5] In other cases the whole business of the trust was let out to the contractor who offered the best terms. In return for a lump sum paid to the trustees, he took the tolls, employed the toll keepers, and maintained the roads.[6]

In the earlier Acts the justices of the peace were sometimes given power to supervise the manner in which the trustees carried out their duties.[7] But, from the middle of the century onwards, the Acts make no such provision. On the contrary, the powers of the trustees were increased, and they were freed from this control.[8] Many turnpike trusts got increased powers each time that their Acts were renewed;[9] and in this way they gradually got a large range of powers which were subject to no supervision. At the same time their powers were not wholly unrelated to the existing machinery for the upkeep of the roads. The creation of a turnpike trust did not exempt the parish from its obligations to maintain the roads—a rule which pressed hardly on the parish if the turnpike trust was negligent or impecunious;[10] nor did it exempt the inhabitants from their duty to perform their statute labour.[11] The surveyors appointed by the trustees were given, in many cases, the powers of a parish surveyor to get material, and

[1] Statutory Authorities 160, 162-164, 191-193.
[2] Ibid 160, 207-208.
[3] Ibid 209-210.
[4] Ibid 208, 210.
[5] Ibid 213-214.
[6] Ibid 214-215; for one or two trusts which were more efficiently conducted see ibid 215-220.
[7] Ibid 164.
[8] Ibid 165.
[9] Ibid 164, 170.
[10] Ibid 168-169.
[11] Ibid 165; for this statute labour see above 154-155.

to exact a proportion of the statute labour—differences between the parish surveyor and the turnpike surveyor being settled generally by two justices. From 1716 onwards the turnpike surveyor was often empowered to agree to take a lump sum, to be raised by a parochial rate, in lieu of the share of the statute labour.[1]

The multiplication of these turnpike trusts made some general legislation necessary to deal with difficulties to which they had given rise. The unpopularity of the turnpikes in some districts gave rise to riots, and to the destruction of the toll gates and houses.[2] One of these Acts made these offences punishable with death.[3] Other Acts, with a view to the preservation of the roads, contained elaborate clauses regulating the provision of weighing machines, the number of horses allowed, and the breadth of the wheels.[4] All these Acts were consolidated in an Act of 1773.[5] It contained eighty-six sections, and a schedule of twenty-seven forms for the conduct of proceedings under it. "In so far as it altered the powers of turnpike trustees, it strengthened their control over their own officials, and enlarged the authority of these officials over the community."[6] This Act remained the basis of the law on this subject till it, and later amending Acts, were superseded by a still more elaborate consolidating Act in 1822.[7]

These were obvious defects in this long series of turnpike Acts. Some of these defects were inherent in this piecemeal method of dealing with main roads. "It took practically a whole century of disconnected effort before even such national arteries as the Great North Road from London to Edinburgh, the Irish road from London to Holyhead, or the Great Western Road from London to Exeter came, for the whole of their length, under the administration of turnpike trusts."[8] Whether or not a particular piece of road came under such a trust depended on the initiative of the inhabitants of particular districts;[9] and the direction taken by the roads was often determined, not by any consideration of the needs of their users, but by personal or local considerations.[10] The jealousy of the existing trusts sometimes blocked proposals for the construction of new and better roads,

[1] Statutory Authorities 166-168. [2] Ibid 173-174.
[3] Ibid 170 n. 4; 8 George II c. 20 § 1.
[4] Statutory Authorities 170 n. 4, 171; see 21 George II c. 28.
[5] 13 George III c. 84. [6] Statutory Authorities 172.
[7] 3 George IV c. 126; fifteen statutes subsequent to the Act of 1773 were incorporated in it, Statutory Authorities 170 n. 4.
[8] Statutory Authorities 177. [9] Ibid 176.
[10] Ibid 178-180; "as late as 1828 . . . we see no less a personage than Sir Robert Peel, the elder, not scrupling to attempt to divert the new turnpike road between London and Liverpool out of its way, in order that it might pass close to his own residence and cotton mills, to the ruin of the town of Tamworth—an attempt frustrated by counter-petitions from Tamworth and . . . an able letter to *The Times*," ibid 179.

because they feared that their profits would be diminished.[1] Other defects were due to the absence of any central control over the manner in which the turnpike trustees used their powers. They were slow to appoint efficient paid officers; the manner in which the treasurer kept the toll monies with his own, and used the interest or any floating balance in his hands, was typical of much of the public finance of the eighteenth century;[2] there was much jobbery in the contracts for materials; and there was little effective control over the toll-men.[3] The process of mortgaging the tolls was sometimes carried to such lengths that little or nothing of their produce was left to be spent on the roads.

> There was, in fact, no practical method of bringing a defaulting, hopelessly incompetent, or dishonest Turnpike Trust to book. Subject to no official superintendence or central control, under no inspection, rendering no accounts, it could use or neglect its powers as it chose. A Turnpike Trust could not even be indicted for letting its roads become impassable.[4]

Adam Smith says that "the abuses which the trustees have committed in the management of the tolls have in many cases been very justly complained of"; and he recommended that more care should be taken in the appointment of trustees, and that better arrangements should be made for their supervision.[5]

At the same time, with all their defects, there is no doubt that these trusts did a great and an essential work for the roads of England. Contemporary observers had no doubt at all about this.[6] In fact it is difficult to see by what other expedient the roads could have been improved. It would have been impossible to persuade Parliament to give any department of the central government the necessary powers, and still more impossible to persuade it to vote a sum of money equal to that raised by the tolls. It would have been equally impossible for the justices in the counties or the boroughs to raise the necessary amount by local rates.[7] "The turnpike trust and its toll was the only way open."[8]

[1] Statutory Authorities 179-181.
[2] Ibid 185.
[3] Ibid 189-190, 194.
[4] Ibid 202.
[5] Wealth of Nations (Cannan's ed.) ii 217-218.
[6] "The most eminent observers of, and participators in, the local government of the latter half of the century—Sir Henry Hawkins, Dr. Richard Burn, John Scott, and Arthur Young—all expressly assert, or at least unequivocally imply, the expediency of the Turnpike Trust and its toll," Webb, Statutory Authorities 205; they were approved in principle by Adam Smith on economic grounds, Wealth of Nations (Cannan's ed.) ii 216.
[7] "Without the local initiative and local support fostered by the thousand separate Trusts; without the emulation and mutual instruction which their several experiments promoted; without the large revenues which the toll drew from the multitudinous but politically helpless road users, no considerable improvement in the highways of England would have taken place for, at any rate, the first three-quarters of the eighteenth century, and very little would have been achieved before the passing of the Reform Bill," Webb, op. cit. 206.
[8] Ibid.

It was not till the beginning of the nineteenth century that anything was done to create a centralized system of road administration. The needs of the Post Office and of the Irish members of Parliament caused the creation, in 1805, of a body of commissioners of the Holyhead road.[1] Parliament was persuaded to make them a grant of money to enable them to institute a considered scheme of road maintenance; and the twenty-three trusts, which managed this road, were persuaded to allow Telford to carry out his schemes of road management. In 1826 fourteen metropolitan trusts north of the Thames were consolidated.[2] Perhaps more might have been gradually done in this direction if the coming of the railways had not diverted public attention from the roads. The Highway Act of 1835, which consolidated the law as to the highways, other than the highways under the jurisdiction of the turnpike trusts,[3] left these trusts subsisting. But the result of the coming of the railways was to leave them in a position which went from bad to worse,[4] and, in consequence, to begin a wholly new epoch in road administration.

The Statutory Corporations for the Administration of the Poor Law.[5]

These bodies differed from both the commissioners of sewers and the turnpike trusts. The commissioners of sewers and the turnpike trusts were quite unconnected with the ordinary machinery of the parish county or borough: these corporations for the administration of the poor law were connected with the existing bodies which administered the poor law, and some of the powers of these existing bodies were transferred to them. "They were, in most cases, practically autonomous federations of parish authorities, urban or rural; in a few instances they were little more than statutory committees of the Municipal Corporation; in others again, mere outgrowths of the Close or Open Vestry of a single parish."[6]

The local Acts by which these corporations were established are important both in the history of local government in general, and in the history of the poor law. In the history of local government they are important for this reason: In many of them there was an element of popular election which was absent in the other bodies through which the local government was conducted.[7] But these popularly elected bodies could not themselves undertake the complex work of poor relief. Therefore we see in them the first regular employment of the device of combining an elective

[1] Webb, op. cit. 220-222. [2] Ibid 230. [3] 5, 6 William IV c. 50.
[4] Webb, The Story of the King's Highway 215-222.
[5] Webb, Statutory Authorities chap. ii.
[6] Ibid 107-108. [7] Ibid 147.

controlling body with a paid executive [1]—a device which in our own days has much retarded the discovery of the frequent inefficiency of controlling bodies, local or central, which are elected on a purely democratic basis. In the history of the poor law they are important because their experiments finally disposed of the idea, current in the sixteenth, seventeenth, and eighteenth centuries, that, by setting the poor to work, it was possible to make institutions for their relief self-supporting, or perhaps even a source of profit.[2]

In very many departments of the local government the breakdown of the system, which the eighteenth century had inherited from the sixteenth, was most apparent in urban or suburban districts. In these closely populated districts it was impossible to carry on the work of government by means of the compulsory and unpaid service of the inhabitants, both because of its magnitude, and because of the new problems to which it gave rise. This was more especially the case with the administration of the poor law. What would do well enough for sparsely populated rural districts, where the inhabitants were personally known to each other, was quite inadequate for the shifting close-packed populations, which were the result of the capitalistic organization of commerce and industry. Hence we find that it is in the towns, and later in the growing suburban districts, that most of these statutory corporations were created; and that the corporations created in the purely rural districts were much less numerous.

The first statutory corporation of this kind was the Corporation of the Poor of the City of London, set up by ordinance of the Parliament in 1647, and confirmed by a statute of 1662.[3] But the most famous, because the most widely imitated, was the Corporation of the Poor of the City of Bristol, set up by a statute of 1696.[4] The management of the poor of the City was taken away from the parishes, and vested in a body consisting of the mayor and aldermen, the churchwardens of the parishes, and four persons elected by a public meeting of each ward. A workhouse was built where the able-bodied poor could be set on work, the old and infirm relieved, and children of the destitute maintained and educated. Powers were given to send to sea or to apprentice these children; and also to force all poor and idle persons to work.[5] This example was speedily followed by

[1] Statutory Authorities 150.

[2] Ibid 109; this was a belief which was very firmly held by Blackstone, Comm. i 360-361.

[3] Statutory Authorities 110 n. 1.

[4] 7, 8 William III c. xxxii; its promoter, John Cary, a Bristol merchant, has given us a very interesting account of the measures taken to put the Act into force, which is printed in Eden, State of the Poor i 275 n. 1

[5] Statutory Authorities 113-115.

other towns.[1] One of the latest of these experiments was made by Shrewsbury in 1783.[2] Under the Act the guardians of the poor were to be a corporation consisting of all the owners of freeholds and copyholds worth £30 a year, and inhabitant occupiers rated at £15 a year. This body appointed the officials of the workhouse—clerk, treasurer, governor, steward, matron and chaplain—and also twelve directors who were to supervise the administration. For some years the institution was successfully worked. But it eventually failed to fulfil its objects, the workhouse became a general mixed workhouse of the usual type, and the corporation was dissolved in 1826. The history of the house itself is not without interest. It had been originally erected by the Foundling Hospital in 1759-1765. It ceased to be used by that institution in 1774, and was then used for American prisoners of war. It was purchased in 1783 by the corporation. On its dissolution the house was left derelict till it was bought by the governors of Shrewsbury school, when the school was moved from the town to its present site in 1882, and converted into the main school buildings.

At the end of the century, in other large towns, such as Manchester and Birmingham, and in many of the metropolitan vestries, statutory bodies were formed, which were in effect statutory committees of the vestry with enlarged powers.[3] In the rural districts, on the other hand, not so many of these statutory corporations are to be found. The chief examples are to be found in Norfolk and Suffolk. In these counties several of the hundreds, into which they were divided, got Acts which united them, and provided for the erection of a workhouse for the different unions of the hundreds and of the parishes comprised in them.[4] By 1785 "over the greater part of the area of these two large counties the administration of the poor law had been withdrawn from the parish officers, and vested in fourteen new bodies of incorporated guardians of the poor."[5] In a few other rural places, notably in the Isle of Wight,[6] this example was followed. But, though these corporations started well, they all eventually failed to fulfil their purposes. The poor were not set to work, and the children were not educated. They degenerated into centres of demoralization, and it became necessary

[1] "Within the next fifteen years thirteen towns successfully applied to Parliament for local Acts which superseded the authority of the Overseers and incorporated a body of 'Guardians of the Poor,' to act for the whole city," Statutory Authorities 115.

[2] Ibid 117-121. [3] Ibid 144-146. [4] Ibid 122-138.

[5] Ibid 125; in 1765 this policy led to a little rebellion in Suffolk, "when a formidable mob, armed with cudgels and scythes, perambulated the County for a week, demolishing the new workhouses and compelling Directors and Acting Guardians to sign written promises to desist from erecting such places in which to imprison the poor," ibid 139-140.

[6] Ibid 138-139.

again to revert to the practice of giving indiscriminate out relief.[1]

In conclusion, it should be noted that many of these Acts added to the powers of the state to deal with vagrants and beggars, by giving large powers to search for, arrest, and send to the house of industry all such persons.[2]

The history of all these statutory corporations shows very clearly that it was the absence of control which was fatal to their continuous success.

> Such authoritative criticism, audit, and control as were elsewhere given to the overseers by petty sessions, individual justices of the peace, and the open vestry, were, to all intents and purposes, non-existent for the statutory body; and there was, as yet, no central authority to take their place. This independence was the more dangerous in that the incorporated guardians sat always in secret, published no accounts or regular reports, and were subject to no outside inspection.[3]

The history of these *ad hoc* bodies thus enforced the lesson which was taught by the history of poor relief throughout the country in the eighteenth and early nineteenth centuries [4]—the lesson that some form of central control was essential to its proper working. This control was provided by the Act of 1834; [5] and, though these *ad hoc* bodies were not immediately dissolved, many were dissolved as the result of later legislation; and all were subjected to the central control established by the Act of 1834.[6]

The Improvement Commissioners.[7]

These bodies—called variously Police, Paving, Street, Lamp, or Improvement Commissioners or Trustees—were rendered necessary by reason of the rapid growth of urban and suburban districts in the second half of the eighteenth century, and by reason of the incapacity of the ordinary county and municipal authorities to cope with the problems of their government. The best description of the nature and urgency of these problems is to be found in the following passage from the Webbs' volume on Statutory Authorities: [8]

> It is difficult for us at the present day to form any adequate idea of the state of a populous and rapidly growing town at a time when it was without anything in the nature of municipal government, as now understood. To begin with the houses springing up on all sides with mushroom-like rapidity—there were absolutely no building regulations. Each man put up his house when and as he chose, without regard for building line, width of street, or access of light and air. Every householder encroached on the thoroughfare by over-hanging windows, swinging

[1] Statutory Authorities 141-144.
[2] Spencer, Municipal Origins 296-301, citing the Chester Act of 1762, 2 George III c. 45.
[3] Statutory Authorities 149.
[4] Above 176.
[5] 4, 5 William IV c. 76.
[6] Statutory Authorities 150-151.
[7] Ibid chap. iv.
[8] Ibid 236-237.

signs, doors opening outwards, cellar flaps habitually open, mounting blocks and flights of steps. . . . Rainwater pipes were unknown, and projecting spouts from between the gutters of the roofs poured the rain in streams on the passers-by. The narrow ways left to foot and wheeled traffic were unpaved, uneven, and full of holes in which the water and garbage accumulated. Down the middle of the street ran a series of dirty puddles, which in times of rain became a stream of decomposing filth. Public provision for street cleaning or the removal of refuse there was none, so that garbage and horse dung accumulated, in places even a yard deep. There, were of course, no sewers and no water-closets; what is not commonly realized is that, except in the better parts of London and the wealthier residential cities, there were neither ashpits nor privies, nor any similar conveniences—with results that are indescribable. Pigs roamed about the streets—the only scavengers. Every yard and blind alley contained pigeons and poultry. Cowsheds and slaughter-houses occupied a large portion even of the main streets, down which the blood periodically ran in streams. At night, when there was no moon, the streets were in pitch darkness, except for an occasional lantern swinging over the door of an energetic shopkeeper or rich householder. With this obstruction, dirt, and darkness, it was perhaps a minor matter that there was no sort of police; outside the City of London, indeed, seldom even a watchman dosing in his box or noisily calling the hour; so that, as the Islington Vestry complains in 1772, "the inhabitants are exposed to frequent murders, robberies, burglaries, and other outrages."

It was to remedy these evils that some three hundred bodies of improvement commissioners were created in the towns and urban districts during the latter half of the eighteenth and the beginning of the nineteenth centuries. And, as the Webbs point out, "it is these Improvement Commissioners, not the Mayor, Aldermen and Councillors of the old corporations, who were the progenitors of nearly all the activities of our present municipalities." [1]

There are one or two instances of the creation of these bodies of improvement commissioners in the late seventeenth and early eighteenth centuries. As London led the way in getting an *ad hoc* body for the management of the poor,[2] so it led the way in getting an *ad hoc* body of improvement commissioners. In 1662 a body of commissioners was established for the cities of London and Westminster, who were to see to the cleansing and lighting of the streets, the repair of roads and sewers, and the abatement of nuisances; [3] and in one or two other places special bodies of commissioners were created.[4] Just as in the case of the turnpike Acts,[5] so with these Acts for the improvement of towns, the Legislature at first entrusted the powers to the ordinary municipal authority; and it was not till 1748 that the Legislature generally gave these powers to an *ad hoc* body.[6] From that time onwards,

[1] Statutory Authorities 236.
[2] Above 212.
[3] 13, 14 Charles II c. 2; 22 Charles II c. 12 § 5; 2 William and Mary sess. 2 c. 8; 8, 9 William III c. 17 § 5; Statutory Authorities 240 n. 1.
[4] Ibid 241-242.
[5] Above 192.
[6] Statutory Authorities 241.

and especially after the peace of 1763, these bodies multiplied fast; and, at the beginning of the nineteenth century, more than two hundred had been created in boroughs and urban districts, and about a hundred in the metropolitan parishes. They "far-outweighed in importance, from the point of view of activity and expenditure in local government, the old municipal corporations, that, in over a hundred cases, existed alongside them." [1]

In the constitution of these bodies there was much diversity of detail; but their constitutions are more uniform than those of the incorporated guardians of the poor. There is often an ex officio element—such as the mayor and aldermen, justices of the peace, or the clergy.[2] Apart from this ex officio element, three main types of constitution can be distinguished. First, in the majority of cases the commissioners named in the Act serve for life, and vacancies are filled by co-option. Secondly, in some cases some of the commissioners are elected; and the number of cases in which the elective element is introduced increases in the third decade of the nineteenth century. Thirdly, there are cases, mainly in provincial towns, where an ex officio element and a named list of persons are combined with a defined class—such as all residents owing £1000 worth of personalty and all occupiers of premises rated at £30 a year.[3] But often the ex officio members never attended, and elections were not held, so that in many cases they were "a self-elected and self-renewing little clique of principal inhabitants." [4]

The powers exercised by the commissioners depended upon the terms of their Act, and, as the Webbs point out,[5] they were in practice limited by the fact that their borrowing powers were confined to a fixed sum, and that their rating powers were confined to a fixed maximum. The contents of the normal Act varied from decade to decade, and the powers entrusted to the commissioners tended to become more elaborate. But there are a certain number of powers generally found in eighteenth-century Acts. Mr. Spencer has analysed with some elaboration the contents of the normal Act,[6] and I give a brief summary of his analysis:

(i) There are preliminary provisions—the title, in which the purposes of the Act are alluded to in general terms; the preamble, which sets out the need for passing it; the constitution of the body to be entrusted with the powers given by the Act; powers to appoint officers, and provisions for keeping records and accounts.[7]

[1] Statutory Authorities 243. [2] Ibid. [3] Ibid 243-245.
[4] Ibid 245. [5] Ibid 246.
[6] F. J. Spencer, Municipal Origins chap v.
[7] Ibid 175-178.

(ii) Then follow the clauses which define the powers of the commissioners. The following is a list of some of the most usual of these powers: (*a*) *Paving*.[1] A power was given to pave streets and lanes; a power to contract for the execution of the work; and often a summary procedure for recovering penalties for breach of contract. There were clauses prescribing penalties for disturbing the pavement, and sometimes an attempt was made to preserve the pavement by regulating the character of the traffic. There was often a power given to take materials compulsorily on payment of compensation. In many of the Acts the obligations of adjoining owners to pave or to pay for the paving were defined. There were generally clauses providing for the repair of the pavement. (*b*) *Lighting*.[2] Provisions for lighting towns began to be general after 1750. The commissioners were given powers to regulate the supply of lamps, and to provide for their lighting and repair. The penalties for damaging them were prescribed. (*c*) *Watching*.[3] From 1736 onwards the provision of a watch, i.e. a local police force, is a normal clause in these Acts. In many of the earlier Acts the parish constable was retained, and the new paid force was put under his control. (*d*) *Cleansing*.[4] For obvious reasons this was the commonest of all the clauses in these Acts. The commissioners were empowered to appoint scavengers, who sometimes in co-operation with the householders, and sometimes by their own efforts, were to clean the streets; and they were empowered to contract for the cleansing of the streets. (*e*) *Nuisances and Obstructions*.[5] Provisions for dealing with these matters were necessary if the provisions for cleansing the streets were to be effective. Provisions of this kind are found in earlier Acts, but they do not become common or elaborate till after the middle of the century. Then they expand, and, "by the end of the eighteenth century we find, even in Acts applying to comparatively small places, a comprehensive code of street regulations."[6] (*f*) *Naming, numbering, and watering streets*.[7] Clauses giving these powers begin to be common at the beginning of George III's reign (1760). (*g*) *Street Improvements*.[8] Many Acts in the later years of the eighteenth

[1] Municipal Origins 178-186. [2] Ibid 187-191. [3] Ibid 192-197.
[4] Ibid 197-204. [5] Ibid 204-225.
[6] Ibid 205. "Signs, sign-boards, projecting spouts, and gutters were regulated or forbidden; dyers', scourers', and barbers' poles must come down; the posts, steps, bulks, stalls, show glasses, cellar flaps, steps, goods, wares, and merchandize, the dung holes and saw pits which obstructed the use of the pavements were to be removed. Traffic in the streets was regulated, driving or riding on footpaths prohibited, rough sports in streets forbidden, the exercise of obstructive or noxious trades in the streets made illegal. In a hundred ways the liberty of the individual to make himself disagreeable was limited in order that the right of every inhabitant to the legitimate use of the common thoroughfare might be preserved," ibid 209-210.
[7] Ibid 225-227. [8] Ibid 227-236.

century gave powers to widen and render more commodious the existing streets, and, for that purpose, to remove obstructions and purchase land. Sometimes the Act gave a general power, sometimes only a power to effect a particular named improvement. In all these cases it was necessary to insert clauses providing for the assessment of the value of the land and its compulsory conveyance, and clauses authorizing persons under disability to convey. The complexity of the law of real property made these clauses lengthy and elaborate. (*h*) *Smoke.*[1] The coming of the steam engine accounts for the introduction of clauses dealing with the smoke nuisance in some of the Acts of the early years of the nineteenth century. These Acts generally prohibited the placing of chimneys in certain positions, and empowered the local authority to make by-laws for their construction. The passing of a general Act in 1821,[2] which improved the common law procedure and remedies in proceedings for a nuisance arising from smoke, rendered these clauses less necessary. (*i*) *Sewers.*[3] We have seen that right down to the nineteenth century a sewer was regarded, not as a sanitary device, but as a device for draining the land by carrying off surface water.[4] It is not therefore surprising to find that hardly a single one of these Acts down to 1835 had in its title any reference to sewers or drains.[5] Powers to construct or repair sewers or drains were given as ancillary to powers in relation to the highways, and to powers in relation to the disposal of surface water, and water from the roofs of houses. None of these Acts rendered compulsory a system of house drainage. All that some of them did was to regulate the conditions under which private drains from houses could be connected with the sewers.

These are the normal clauses found in nearly all Acts. There were also other clauses which are found in the Acts of particular towns or groups of towns. These clauses relate to such subjects as markets, fire extinction, water supply, town halls, gaols, slaughter-houses, cemeteries, gardens, bridges, shore preservation, harbours, regulation of carriages, power to make by-laws provided that they are not inconsistent with the Act or the general law.[6]

It should be noted that the dominant object of these Acts is not the preservation of the public health—the character of the clauses relating to the sewers shows this; but the regulation of the streets with the object, first of facilitating easy locomotion, and secondly of protecting life, limb, and property.[7] As late as 1835 it had

[1] Municipal Origins 236-241.
[2] 1, 2 George IV c. 41.
[3] Municipal Origins 242-263.
[4] Above 199 n. 1.
[5] Municipal Origins 242.
[6] Ibid chap. vi.
[7] Webb, Statutory Authorities 274.

never occurred, even to the most energetic and enlightened Local Authority, that it had any responsibility for the freedom from noxious filth of the town as a whole. Not for another generation, and then not without the sharp lesson of repeated visitations of Asiatic cholera, did even the beginnings of municipal sanitation permeate English local administration.[1]

The passing of the Municipal Corporations Act in 1835 [2] did not end the powers of the improvement commissioners. The Act only enabled the commissioners to surrender these powers to the corporations created by the Act. "The result was that the Municipal Corporations Act of 1835, like the General Highways Act of that year, and the Poor Law Amendment Act of 1834, left untouched the commissioners under Local Acts, whether for town improvements, turnpike roads, or the administration of poor relief." [3] But in fact the progress made by the new town councils in providing for the good government of the borough, and the pressure of such departments of the central government as the Board of Health, gradually brought to an end these *ad hoc* bodies, and merged them in the new organs of local government which the legislation of the nineteenth century was creating.

All this legislation, and more especially the legislation which created *ad hoc* bodies for these various purposes, gave an immense impetus to the extension of those modern ideas of local government which, as we have seen,[4] were being introduced by the general legislation of this period. It is easy to criticize the activities of all these bodies from the point of view of a set of political ideas which welcomes centralization, and sets no store by economy. But it must be remembered that they were created at a time when centralization was anathema, when any diminution of the independence and self-governing character of the units of local government was fiercely resented, when economy in administration was more highly prized than efficiency. In spite of all their shortcomings, they succeeded in introducing modern ideas into important departments of the local government, which could have been introduced in no other way. Without the turnpike trusts there could have been no radical improvement of the roads before the beginning of the nineteenth century.[5] The incorporated guardians of the poor helped to introduce the idea of administration by paid officials under the control of an elected and representative body.[6] In the powers entrusted to the improvement commissioners we see the beginnings of very many of the modern activities of municipal government; [7] and in the

[1] Statutory Authorities 344.
[2] 4, 5 William IV c. 76.
[3] Statutory Authorities 346.
[4] Above 164-187.
[5] Above 210.
[6] Above 211-212.
[7] Above 215.

evolution of the many Acts and amending Acts, got from time to time by many urban centres, we see the definite supersession of the mediæval idea of compelling the individual to perform certain services—such as paving and lighting—and the definite adoption of the modern idea that these services should be done by the community at the cost of the ratepayers.

It is to this legislation, whether it conferred new powers on the older authorities or whether it created new *ad hoc* authorities, that we must look for the origins of the modern machinery of local government. That machinery was partly old and partly new. But, whether old or new, its units still retained that mediæval autonomy and independence, which in England alone had continued to characterize them. Hence the working of this machinery by these autonomous units produced developments both in the machinery itself, and in the law which resulted from its working. It was through these developments that much old machinery was adapted to new needs, and that the new machinery provided by statute was made to function efficiently. To the working and effects of this third element in the growth of modern ideas of local government we must now turn.

(3) *The adaptation of old machinery to the new conditions.*

All parts of the English constitution in the eighteenth century had retained mediæval characteristics—a result mainly due to the victory which Parliament had won with the help of mediæval precedents.[1] One of these mediæval characteristics, which can be seen in both the central and the local government, was the autonomy of all the organs of government.[2] Within the sphere assigned to them by the law, they were free to perform their functions in their own way. Therefore they could both make and vary rules as to the methods of performing their functions as and when they saw fit to do so. It followed that the machinery, thus evolved by all these organs of central and local government, created institutions of government; and that the rules evolved for the working of this machinery created a body of constitutional law which defined the rights, duties, and powers of these institutions. Just as in the sphere of private law the working of the forms of action created the principles of substantive law, so, in the sphere of government and administration, the machinery and the procedural rules of these autonomous organs of government have created much constitutional law.

From an early period we can see these processes at work in many departments of the government of the English state. In the eighteenth century, their working was particularly fruitful.

[1] Vol. vi 83. [2] Ibid 59-61.

Central control was weak; and, at the same time, it was necessary to adapt and develop machinery, which was often very mediæval, to the needs of a state, which, in the latter part of the century, was being transformed through the working of new political, economic, and intellectual forces and ideas. And so, in all parts of the English governmental machine, the pressure of new needs and new ideas compels the different organs of government to devise new machinery and new rules for the working of that machinery, to which we must look for the origins of many modern institutions, and much modern law. Let us look at one or two examples.

From the first the courts of law and equity had been free to fashion their own rules of procedure, and to add to or vary them to meet the needs of litigants and the development of legal principles.[1] These rules were elaborated in the eighteenth century, and, consequently, the systems of procedure and pleading at law [2] and in equity [3] were developed into rigid and highly technical systems. From the first, also, both branches of the High Court of Parliament—the House of Lords and the House of Commons—had evolved their own rules of procedure.[4] The fact that they had been able to develop these rules was, as we have seen,[5] the main reason why they had been able to win the battle for constitutional government in the seventeenth century. We shall see that these rules, in the course of the eighteenth century, developed into an elaborate code, which formed the most considerable part of the *Lex et Consuetudo Parliamenti*, and is the basis of the modern code of Parliamentary procedure. We shall see also that many of the old departments of the central government had developed, and that many of the new departments were developing, their own technical rules of procedure, which were giving rise to bodies of rules and principles which, in their origins, were, to use the apt word of the Webbs, extra-legal.[6] In the same way, in the sphere of local government, all the organs of that government, both the regular organs of local government and the *ad hoc* bodies,[7] were devising new machinery and new rules of procedure to cope with the new duties imposed upon them by the Legislature, or with the new needs imposed upon them by new social and economic conditions. One striking example is, as we have seen,[8] the manner in which the old procedure of presentment, which played so great a part in the local government in the sixteenth and seventeenth centuries, was, in the course of the eighteenth century, first modified and then reduced to a very bare formality.

[1] Vol. ii 512; vol. iii 623-624, 627-633.
[2] Vol. ix chap. vii § 2.
[3] Ibid § 3.
[4] Vol. ii 431-434; vol. iv 174-178; vol. vi 88-92, 255-256.
[5] Ibid 87.
[6] Below 498, 514-515.
[7] For an illustration see below 228.
[8] Above 149-151.

All these developments have a common element—they are all, originally, rules of practice and procedure evolved in order to enable the organism to fulfil its appointed functions. Many of them develop in a similar way into rules of law, which, in time, are restated in statutory form.

We have seen that, in the sphere of local government, the beginnings of this process can be discerned in the late sixteenth and the early seventeenth centuries. We have seen that we can discern a differentiation of the sessions of the justices of the peace, in order to enable them the better to fulfil their multifarious duties, and the beginnings of an official staff.[1] During the late seventeenth and the eighteenth centuries there are many similar developments in many of the organs of the local government—in the work of the justices, in the vestries, and in the boroughs. We see the development (i) of a more elaborate organization of the machinery of local government; (ii) of a more numerous paid staff; and (iii) of what the Webbs have rightly called a "provincial legislature." Some of these developments were, it is true, assisted by the Legislature. But, for the most part, they were spontaneous "extra-legal" developments, made by the autonomous communities to enable them to perform their governmental functions.

(i) *The development of a more elaborate organization of local government.*

To some extent this development was assisted by the legislation which has been already described, especially the legislation which created such *ad hoc* bodies as the statutory corporations for the administration of the poor law, and the improvement commissioners.[2] In one or two cases the Legislature enacted that special sessions should be held for special purposes, such as the administration of the highways or the licensing of alehouses.[3] In one or two cases also the Legislature made regulations as to the powers of churchwardens and overseers to grant relief and to make rates for that purpose.[4] But, for the most part, the development of the more elaborate organization required for the new system of local government, which was coming into being in the course of this century, was due to the extra-legal activities of the different units of the local government. Let us examine some instances from three of these units —the justices of the peace, the vestries, and the boroughs.

[1] Vol. iv 145-151. [2] Above 211, 214. [3] Above 171, 185.
[4] Webb, The Parish and the County 165 n. 4, citing 3, 4 William and Mary c. 11, 17 George II c. 3, 36 George III c. 23.

The justices of the peace.

We have seen that, in the late sixteenth and early seventeenth centuries, the admonitions of the Council and the pressure of business had created a necessity for a differentiation of the sessions of the justices. There were special sessions held for divisions of counties at which certain statutes were enforced; and in them we can see the beginnings of such sessions as the highway sessions and the brewster sessions, which were later regulated by statute.[1] Moreover, we see signs of a differentiation between the judicial and the administrative business of the justices.[2] After the Restoration the Council ceased to be able to control the justices as it had controlled them in the earlier part of the century;[3] but the pressure of business, which was being constantly increased by fresh legislation, made the continued differentiation of the sessions necessary, increased the differentiation between the judicial and administrative sides of the justices' work, and created the necessity for the evolution of rules of procedure for the conduct of business at the sessions.

As we might expect, we find this process of differentiation of the sessions most pronounced in urban and suburban districts.[4] An order made by the quarter sessions for Middlesex in 1705, that the petty sessions for the several divisions of the county should be held "at the known and usual place,"[5] and an order made in 1716 which attempted to restrict the jurisdiction of justices to business arising in their own divisions,[6] show that in Middlesex this differentiation was well recognized.[7] In the eighteenth century the justices in many of the large London parishes held petty sessions for the parish;[8] and in other large towns there was established, at the end of the eighteenth century, a magistrates' office, at which two county magistrates arranged to attend

[1] Vol. iv 147-148; above 171, 185.

[2] Vol. iv 144.

[3] Vol. i 516; vol. vi 112-113.

[4] Thus in Middlesex the Act of 3 William and Mary c. 12, which created special highway sessions, above 171, "had been anticipated by the Middlesex justices, not by the establishment of special highway sessions at regular intervals, but by the gradual and unsystematic development of local meetings for the transaction of all business which the justices were empowered to perform either singly or in pairs, of which that relating to the highways formed no small part," E. G. Dowdell, A Hundred Years of Quarter Sessions, 90.

[5] Webb, The Parish and the County 401.

[6] E. G. Dowdell, MS. thesis on The Economic Administration of Middlesex studied in the Records of Quarter Sessions 17; an order of 1671-1672, in view of the fact that persons committed to prison or the house of correction by one justice were sometimes released by another, had forbidden gaolers to take their prisoners to justices who did not belong to the division of the justice who had committed the prisoner, ibid 17-18.

[7] This development seemed likely to be hindered by a decision of the courts that justices living in a parish could not, because they were persons interested, act in cases concerning the poor law, vagrancy, or highways; but the decision was overruled by 16 George II c. 18; see Dowdell, A Hundred Years of Quarter Sessions 8.

[8] Webb, The Parish and the County 402, 403-406.

in rotation at least once a week.[1] In the rural districts the old regime lasted longer. "Overseers continued to be appointed, rates to be signed, and accounts to be allowed by casual pairs of justices meeting when and where they chose. Similarly the county justice long continued in his own house to deal with every offender whom the parish constable brought into his justice room."[2] But in the last quarter of the eighteenth century, arrangements were made in several counties for holding special sessions at regular times;[3] and by the end of the first quarter of the nineteenth century such sessions had become universal.[4] This development was accompanied by a tendency on the part of the court of King's Bench to put a narrow interpretation upon the term "special sessions," when it was used in some of the legislation of the period, which fettered the complete freedom formerly enjoyed by the justices to differentiate their sessions[5] and to order their procedure[6] as they pleased.

The line between the judicial and administrative sides of the justices' work was becoming more obvious. But it was a long time before it was drawn quite as it is drawn to-day. We have seen that the functions of the jury of presentment, and the need to get a preliminary presentment before certain kinds of administrative work could be done, prolonged the life of mediæval ideas and machinery, and delayed the attainment of a completely logical separation between the two functions.[7] One line of division between the two sides of the work of quarter sessions was becoming obvious at the beginning of the eighteenth century. Their judicial work was done in open court, and, in criminal cases, the trial was by a jury: the administrative work was done by the justices themselves in private.

As soon as the business which involved the presence of outsiders was concluded, or at any rate was ended for the day, the justices would formally adjourn to a private apartment in the most comfortable alehouse in the town, where, over a convivial meal, or immediately after it, they would order payment of the accounts due, fill any vacancies in the salaried offices of the county, and give such orders to the Clerk of the Peace, the Bridge-masters, or the Keepers of the Houses of Correction as were within their own competence. These primitive habits lasted in some of the most remote and sparsely inhabited counties down to the third decade of the nineteenth century.[8]

[1] Webb, The Parish and the County 401 n. 1.
[2] Ibid 406.
[3] Ibid 406-408.
[4] Ibid 408.
[5] The King v. the Justices of Devon (1818) 1 B. and Ald. 588—a restricted interpretation was put on the term "Petty Sessions" for the purpose of 37 George III c. 143 § 1.
[6] The King v. the Justices of Worcestershire (1818) 2 B. and Ald. at p. 233 *per* Bayley J.—notice must be given to the other justices of the division of a special sessions held for the purpose of diverting a road.
[7] Above 146-151.
[8] Webb, The Parish and the County 438-439.

The establishment of a more regular order of business—a process in which the county of Middlesex led the way [1]—introduced a more complete differentiation of the two sides of the work of quarter sessions. This differentiation was completed when the mediæval judicial forms, under which the quarter sessions did much of their administrative work, were finally superseded at the beginning of the nineteenth century.[2]

In the case of the work done by the justices out of quarter sessions the differentiation was never so complete. Their judicial work was not necessarily done in public, nor was the trial by a jury. The result was that the mediæval indistinctness between judicial administrative and legislative acts long survived.[3] The danger that the many powers of different kinds, which were either given to the justices by the Legislature or delegated to them by quarter sessions, would be exercised in an arbitrary way, was met by allowing appeals from their orders to quarter sessions.[4] This was a considerable safeguard because, as the business of quarter sessions came to be differentiated, it necessarily acquired some settled rules of procedure, which operated both as a curb upon arbitrariness, and as a guarantee of a judicial hearing.

The development of more settled rules of procedure was necessary in order to enable this more elaborate organization of the machinery of local government to function efficiently. I have already said something of the development of rules which provided for the better organization of the multifarious business of quarter sessions.[5] A second step in the same direction was the development of a committee system. From an early period quarter sessions had been in the habit of delegating a particular piece of work, e.g. the repair of a bridge or a gaol, to one or more justices.[6] During the eighteenth century we meet with committees to deal with particular emergencies—a suspicious charge in the accounts of some of their officers, the manner of levying the rates, the removal of nuisances.[7] In Middlesex, from 1723 onwards, we see the rise of standing committees to deal with such matters as accounts and prisons, and even something like " an incipient general purposes committee." [8] This example was followed by other counties in the late eighteenth and early nineteenth centuries.[9] A third step which some quarter sessions were taking in the latter half of the eighteenth century, was the institution of a permanent chairman.[10] Moreover, at the beginning of the nineteenth century, in Lancashire and Surrey, there

[1] Webb, The Parish and the County 440.
[2] Above 151.
[3] Webb, op. cit. 419.
[4] Ibid 420.
[5] Above 223-224.
[6] Webb, op. cit. 526-527.
[7] Ibid 530-531.
[8] Ibid 531-532.
[9] Ibid 532-533.
[10] Ibid 433-436.

was a separate permanent chairman for the criminal business of the sessions.[1] A fourth step is the gradual growth of procedural rules. Quarter sessions from time to time found it necessary to make rules of procedure for the practical conduct of all parts of its business—more especially its judicial business. Thus in the North Riding records there is an order in 1692 that, in certain cases, the parties must be represented by professional lawyers.[2] There are orders of the same kind in the Shropshire county records ;[3] and in those records there are many orders as to the procedure on appeals, as to costs, and as to procedure in criminal cases.[4] The orders made as to the non-judicial business of the sessions, illustrate the fact that this increase in business demanded the growth of regularity and system. As early as 1665 it was ordered that no private business be heard before the public business of the county was determined.[5] In 1697 it was ordered that no matters or causes disputed and settled at a full court "should afterwards at the latter end of the sessions be controverted."[6] In 1702 there is a rule as to the entry and reading of minutes.[7] In 1791 it was found necessary to order that only the acting justices should come on to the bench.[8] In 1808 a committee was appointed to revise all orders as to practice.[9] In 1834 there is an order as to the mode in which magistrates' votes are to be taken.[10]

The vestries

In many of the vestries in urban districts parish government was reorganized by the inhabitants, "by the adoption of constitutional devices for which there was no legal authority."[11] In the first place, the meeting of the parishioners was organized.

[1] Webb, op. cit. 436.

[2] J. C. Atkinson, North Riding Sessions Records vii 125—"Ordered that for the better dispatch of business nothing be moved in Court that is either of a parochial or Constablary concern, or wherein any point of law or difficulty may arise by any person, but such who are belonging to the law if there be any present."

[3] Shropshire County Records i 136 (1691)—parties must appear by counsel if any were present, and counsel must wear gowns and bands; ibid ii 159 (1756) —"all orders of Court to be made upon Motion of some Council or Attorney."

[4] See a summary of these orders, from 1711 to 1796 ibid iii 81-82.

[5] Ibid i 88. [6] Ibid i 167.

[7] Ibid i 201—"Minutes of all orders to be read the last day of every Sessions, no order not entered in the book of orders to be read, and no person or place to have any advantage of an order not entered."

[8] Ibid iii 52—"In future if any Person come upon the Bench or unto the Place appointed for acting Justices Mr. Loxdale shall desire such Person to withdraw into one of the Boxes adjoining. . . . The Chairman to enforce the Order."

[9] Ibid iii 154.

[10] Ibid iii 300—"On any division taking place respecting any matter brought before the Court, the names or initials of the Magistrates voting *pro* or *con* to be written on a paper as is the practice on appeals, or the Clerk of the Peace to take down the way each Magistrate wishes to vote."

[11] Webb, The Parish and the County 104.

Rules were made restricting the classes of persons assessed to the rates, and therefore the class of persons entitled to a vote; at the meetings of the vestry provision was made for a chairman; it came to be customary to give notice of the business to be transacted; and rules were made as to the method of voting.[1] In the second place, the vestry assumed control over its unpaid officials—overseers of the poor, surveyors of highways, and constables. It decided who should hold these offices, and how many of these officials should be appointed;[2] and the justices were expected to confirm, and usually did confirm, the arrangements made by the vestry.[3] It also assumed control over conduct of these officials, giving them orders, and scrutinizing their accounts. "By the end of the eighteenth century the submission of the overseers' accounts to the vestry was regarded as a moral duty, and enjoined by all the authorities."[4] It is not surprising to find that the vestry made general rules for the guidance of its officials. Thus, it was not infrequently ordered that repairs and improvements to the church or other buildings should be done by contract, and that preference should be given to tradesmen of the district.[5] As the Webbs have pointed out,[6] the best example of the evolution by a vestry of an extra-legal constitution is to be found at Liverpool. This vestry devolved the executive work of the parish upon a committee called "the Gentlemen of the Parish." They, with the approbation of the vestry, appointed a large paid staff of officials for the highways, poor relief, rating, and other duties; and they published financial statements. But they did not supersede the vestry by which they were appointed. They consulted it as to the appointment of officials; and, on any occasion when a new policy was to be adopted, they presented elaborate reports in which they set out the reasons for their recommendation.

The boroughs

We have seen that, in the course of the sixteenth and seventeenth centuries, many of the boroughs got a separate commission of the peace, and that the parochial organization of the county was introduced into them.[7] The result was that, in the course of the eighteenth century, a gradual change in the organization of the government of many of the boroughs took place. This change was (*a*) the indirect, and to some extent extra-legal, result of the rise in the importance of the borough justices, and (*b*) the direct result of the statutory powers of *ad hoc* bodies of

[1] Webb, The Parish and the County 104-107, 109-110.
[2] Ibid 111. [3] Ibid 112. [4] Ibid 118.
[5] Ibid 120. [6] Ibid 135-137. [7] Vol. iv 133.

improvement commissioners, which, as we have seen,[1] made their appearance in most of the important boroughs.

(*a*) The municipal corporation as such ceased to be the effective governing body of the borough. All the powers of government tended to become vested in those members of the corporation, such as the mayor and aldermen, who were justices of the peace. They controlled the vestries, and appointed the parochial officials.[2] This "necessarily affected the balance of the various parts of the working constitution" of the boroughs.

> It was to the borough justices, and not to the corporation, that the privy council and the secretary of state came increasingly to look for the peace and good order, and freedom from sedition, of their respective boroughs. It was to the borough justices that any warnings were addressed and any communications as to the regulation of liquor licensing, the management of the gaols, or the prevention of vagrancy, were made. Thus the borough justices, besides sitting on the judicial bench, silently developed into an important legislative and executive authority for their town, more or less distinct from the corporation as such; tending to become, in fact, an influential private committee of leading members of the corporation, which in nearly all matters wielded in the borough the real power of government.[3]

(*b*) The newer services, which the growth of the borough demanded, were, as we have seen, entrusted, not to the corporation, but to *ad hoc* bodies of paving, lighting, police, or improvement commissioners.[4] The powers of these commissioners were limited by the statutes which created them. But we have seen that they were neither controlled nor inspected by the central government;[5] and so, like the older units of local government, they were in fact very autonomous bodies. Therefore we find in their activities, as in the activities of those older units, extra-legal developments and experiments in government, if the making of these developments and experiments appeared to them to be required by the exigencies of their district. One striking illustration of such a development was the initiation in 1817, by the Manchester improvement commissioners, of municipal gas works —a step which was wholly unauthorized by law.[6]

(ii) *The development of a more numerous paid staff*

We have seen that, from the first, some of the *ad hoc* bodies created to meet modern needs were obliged to appoint a numerous paid staff. Both the statutory corporations for the administration of the poor law, and the improvement commissioners, were obliged to appoint many paid servants. In the boroughs also,

[1] Above 215.
[2] Webb, The Manor and the Borough 386-387.
[3] Ibid 389-390.
[4] Above 215-216.
[5] Above 220-221.
[6] Webb, Statutory Authorities 262.

comparatively early, we find a number of paid officials—the recorder who held the borough courts, the chamberlain or treasurer, and the town clerk.[1] The office of town clerk increased in importance with the increase in importance of the administrative work of the boroughs. He became in many cases the chief permanent official of the corporation, and, as such, filled many of the older offices.[2] Those boroughs which were counties in themselves had the ordinary county officials—the sheriffs and the coroners; and the various parishes within their borders had the ordinary parochial officials. Thus, in some cases, the borough officials originated from, and were offshoots of, older undifferentiated officials, which dated from the days before the corporation was fully developed; and in other cases they were the same officials as those possessed by the counties and the parishes. The beginnings of the modern paid staffs of the municipalities, like the beginnings of the modern activities of municipal government,[3] originated in the staffs of the *ad hoc* statutory bodies, rather than in the staffs of the corporation, or of the justices of the peace, who were, as we have seen,[4] coming to be the really governing bodies of the boroughs.

In the country at large the mediæval tradition of unpaid and compulsory service, which the sixteenth and seventeenth centuries had inherited, died hard. But, in the course of the eighteenth century, the increasing amount and complexity of the business of local government compelled both the counties and the parishes, more especially those counties and parishes which were becoming urban or suburban in character, to depart from this tradition. Acting, not by virtue of any statute or rule of the common law, but by virtue of their inherent powers, they gradually developed a staff of paid officials, in order to cope with the work which either Parliament, or changing social and economic conditions, had placed upon them. They could not, of course, contravene express statutory provisions; but, generally, the statutes left them free to adopt any means they chose to put the statute in force; and, in the rare cases in which rules of the common law impeded these developments, the rules were evaded or disregarded.[5]

In the case of county business we have seen that the clerical staff of the justices developed from two centres. (i) The clerical

[1] Webb, The Manor and the Borough 321-327.

[2] "In one borough or another we find him acting as clerk of the peace, prothonotary, clerk of indictments, clerk to the magistrates, registrar and clerk to all the borough courts; he would sometimes be coroner, under sheriff, deputy recorder, corporation solicitor, keeper of the records, steward of the corporation manors, and billet master. He might preside at the court leet, court baron, borough court, or court of pleas, or sit as assessor in the mayor's court," ibid 327.

[3] Above 212, 215. [4] Above 140.

[5] For an illustration of this see above 175 n. 9.

staff of the quarter sessions originated in the clerk of the peace —the appointee of the *custos rotulorum*—who, by himself or his deputy, drew up the records and did the other clerical work of the sessions. (ii) The clerical staff of the other sessions of the justices originated in the private clerks of the justices. Both sets of clerks were remunerated by fees for the work which they did. For the rest, the justices relied on the older unpaid officials of the counties and the franchises, and of the parish.[1]

The incompetence of such a staff to work the new machinery of local government became more and more obvious. The need for a more adequate staff was met in two ways. In the first place, some of the older officials were gradually and partially adapted to the new situation. In the second place, new officials paid for their services were appointed.

(i) The clerk of the peace was the appointee of the *custos rotulorum*. He was often a dignified person, and no one supposed that he would do personally the duties of his offices.[2] As in so many other cases in the eighteenth century,[3] he did his work by deputy. The deputy was generally a leading solicitor who looked upon the justices and the litigants or other persons who appeared before them, as his clients, and charged them fees on the same principle as he charged his other clients.[4] How much he could charge, whom he could charge, and on what occasions, were questions which were regulated partly by statute, but mainly by custom; and they gave rise to many disputes.[5] It was not till the second half of the nineteenth century that the office of clerk of the peace was adapted to modern conditions, and came to be paid by a fixed salary.[6] But we have seen that in the rules as to the tenure of his office traces still survive of the old conception, firmly held in the eighteenth century, that offices were the freeholds of their incumbents.[7] Similarly the clerks to divisional or petty sessions, who were often local attornies, were paid by fees.[8] Quarter sessions, at the beginning of the eighteenth century, made some attempts to regulate these fees;[9] and by a statute of 1753[10] they were required to publish a table of fees, and to submit it for approval to the judge of assize.[11]

[1] Vol. iv 149-151. [2] Webb, The Parish and the County 503.

[3] For instances in the case of many of the officials of the courts of common law and equity, vol. i 258-259, 421-422, 424-425, 441, App. XXX; for instances in other departments of the state see below 501-503.

[4] Webb, op. cit. 505. [5] Ibid 506. [6] Ibid 507 n. 3.

[7] Above 129; for this conception and its results see vol. i 246-251.

[8] Webb, The Parish and the County 415-416; some of these fees were perhaps originally payable to the justices, but, except in the case of the "trading justices" in Middlesex, they did not take them, but remunerated their clerks by allowing them to take them, ibid 412-414.

[9] Ibid 416. [10] 26 George II c. 14.

[11] Payment by salary was authorized in 1851, 14, 15 Victoria c. 55 § 9; but the Webbs say that payment by salary in lieu of fees "though general is not invariable," op. cit. 417 n. 1.

The other official, whose position was gradually and partially adapted to the new situation, was the high constable. We have seen that the high constable was one of the unpaid and compulsorily serving officers of the mediæval type; and that, in the course of the sixteenth century, he had come to hold the threefold capacity of servant to the justices, representative of the hundred, and a person directly entrusted with the execution of specific statutory duties.[1] In the course of the eighteenth century his independence diminished—he ceased to hold sessions of his own,[2] but his work increased. He tended to become merely the servant of the justices, charged with "the execution of nearly all their administrative orders."[3] The high constables must supervise and control the petty constables, see that they enforced the vagrancy laws, carry out, through them, the justices' orders for the keeping of watch and ward and the conduct of privy searches.[4] In 1749-1750 the obligation of seeing to the enforcement of the regulations as to the cattle plague was placed upon them.[5] They were charged with the execution of the statutes as to weights and measures;[6] and, most onerous duty of all, they must levy and collect the county rate.[7] The result was that many high constables found various means of illicitly remunerating themselves.[8] In fact the justices found it necessary to provide remuneration. They provided it by allowing them, quite extra-legally, certain charges and expenses; and, in the West Riding of Yorkshire, at the beginning of the nineteenth century, they were paid regular salaries.[9] The establishment of a professional police force, which the high constables were expected to organize, made it clear that they must be paid officials. In 1839 and 1840 their police duties were handed over to a new official—the chief constable; and in 1869 the old office of high constable was abolished.[10]

Similarly the petty constables had ceased to be the executive agents of the township or parish, and had come to be the executive agents of the justices of the peace, and the representatives of the township and parish.[11] This evolution linked them up with the new organization of local government under the control of the justices of the peace. Like the justices of the peace, they became

[1] Vol. iv 122-125. [2] Ibid 125 n. 1, 147 n. 1; Webb, op. cit. 492-493.
[3] Ibid 493. [4] Ibid 494-495.
[5] Ibid 495-496. [6] Ibid 496-497.
[7] Ibid 497-499—"this business of apportioning the county rate, and its collection from the parish officers, became every decade more onerous, until, at the opening of the nineteenth century, the officers in such counties as Middlesex, Lancashire, and the West Riding of Yorkshire found themselves charged with financial responsibility running into thousands of pounds."
[8] Ibid 499. [9] Ibid 501-502.
[10] Ibid 502 and n. 2; 2, 3 Victoria c. 93; 3, 4 Victoria c. 88; 32 Victoria c. 47.
[11] Vol. iv 123-124.

more definitely the servants of the Crown ; [1] but they were the appointees and servants of the justices ; [2] and, just as the petty and quarter sessions were to a large extent autonomous units of local government, so the petty constables filled many parts and had many capacities, amongst which their position as the servants of the Crown was by no means the most prominent. It is only in the nineteenth century, and as the result of the establishment of a professional police force controlled partly by the local authorities, and partly by the Home Secretary, that this modern police force—the successors of the unpaid petty constables—has emerged as "a servant of the state, a ministerial officer of the central power, though subject, in some respects, to local supervision and local regulation." [3]

(ii) New officials paid for their services make their appearance. The first of these was the county treasurer. Many counties had such an official at the beginning of the eighteenth century, who took over the management of various county funds for which there were formerly separate treasurers.[4] He acted primarily as banker and book-keeper ; but the justices sometimes placed other duties upon him, e.g. the superintendence of repairs to the gaol.[5] At first he had no regular salary ; but the increase in his work at the close of the eighteenth century made regular remuneration necessary.[6] The practice of appointing a paid surveyor to look after the county bridges was much later—indeed the practice did not become general till the beginning of the nineteenth century.[7] In fact, the emergence of a staff of paid officials for the business of the county was very slow. The mediæval tradition of unpaid and compulsory service was still strong ; and we have seen that much of the county business was still cast into the mediæval judicial mould of presentment and indictment.[8] That meant that the mediæval view that the law would be obeyed, and that it was sufficient to provide for the punishment of those who did not obey, still prevailed. The fact

[1] They are equated with other servants of the Crown, such as sheriffs or justices of the peace, in Mackalley's Case (1612) 9 Co. Rep. at ff. 68*a*, 68*b*.

[2] Vol. iv 123-124.

[3] Fisher v. Oldham Corporation [1930] 2 K.B. at p. 371 *per* McCardie J. ; I think that the learned judge places the emergence of this idea too early, see pp. 369-370 ; it is I think a nineteenth-century development ; that his judgment gives the true view of their present legal position is, I think, clear from such cases as Coombes v. Justices of Berks (1883) 9 A.C. 61 ; and Stanbury v. Exeter Corporation [1905] 2 K.B. at pp. 841, 842-843 ; but, as McCardie J.'s learned judgment shows, this view of their legal position has not always been clearly recognized in the modern cases ; I cannot help thinking that this is due to the autonomy of the units of local government and their agents—an autonomy which, though much diminished to-day, still exists.

[4] Webb, The Parish and the County 507-509 ; vol. iv 151 n. 1.

[5] Webb, op. cit. 508, 509.

[6] Ibid 512.

[7] Ibid 512-521.

[8] Above 146-149, 153-155.

that in two counties at least—in the North Riding of Yorkshire [1] and in Essex [2]—the justices appointed a common informer, remunerated, presumably, by his share of the penalties which he recovered, is an eloquent testimony to the survival of these ideas. In these circumstances it is not surprising that the county authorities should eke out the deficiency of a staff of paid officials by a recourse to the contractor. This contract system permeates the whole of the local government of the eighteenth century.[3] It may be regarded partly as the cause and partly as the effect of the slow development of a staff of paid officials.

We can see the same phenomenon—the slow emergence of a staff of paid officials—in some of the urban and suburban parishes. One of the earliest of these officers is the vestry clerk, who was appointed to do the secretarial work of the churchwardens and overseers.[4] In many parishes it was found expedient to appoint paid overseers to assist the unpaid overseer; and though, as we have seen, this course was declared to be illegal, it was still pursued.[5] Similarly, some parishes paid a permanent constable; [6] and a paid surveyor of highways was sanctioned by statute.[7] We have seen that those parishes which kept a workhouse were obliged to appoint a paid staff to manage it. "The master of the workhouse, or even the contractor by whom it was farmed, might, for convenience, receive an appointment from the justices as overseer or constable, and thus further bring these independent parish offices under popular control." [8]

Thus in many different departments of the local government we can see the small beginnings of that local bureaucracy which has, in our days, become not only an essential part of the local government, but also, in some respects, its real controller. But,

[1] In 1680-1681 there is the following entry in the North Riding Quarter Sessions Records (vii 47): "Ordered that F. Kitching of Thornebrogh yeoman be admitted as common informer for Richmondshire and Allertonshire, and continue the said imployment during the pleasure of the Court."

[2] Webb, op. cit. 523.

[3] "Up and down the country, in every conceivable service, the easiest way of getting the work done seemed to be to 'farm' it, or put it out to contract to the man who offered the most advantageous terms . . . the prisons, like the workhouses, were farmed to the gaolers, keepers, governors, or masters; their wretched inmates, if fed and clothed at all, were fed and clothed by contract and even physicked by contract; the bridges and roads . . . were often kept by contract, in what they were pleased to call repair; the vagrants were conveyed by contract, fed by contract, and even whipped by contract; and when the felons were sent beyond seas, they were habitually transported by contract, and sold by auction on arrival to those who contracted at the highest rate to employ them," ibid 525; above 177; vol. xi 574 and n. 3.

[4] Ibid 124-126; but it was held in The King v. the Churchwardens of Croydon (1794) 5 T.R. 713 that, as this was not "a fixed permanent office," but depended "altogether on the will of the inhabitants who may elect a different clerk at each vestry," no mandamus would lie to admit to the office.

[5] Webb, The Parish and the County 125; above 153-154.

[6] Webb, op. cit. 129. [7] Above 172. [8] Webb, op. cit. 130.

as yet, this bureaucracy is in its infancy. These paid officials were really the servants of the justices and the parishes. Their number, their pay, and the conditions of their service were different in different districts. They were controlled wholly by their employers; for there is as yet no central bureaucracy which controls their employers, and shares with their employers the control over their servants.

(iii) *The development of a "provincial legislature."*

We have seen that mediæval law drew no clear line between administrative judicial and legislative acts.[1] In the sphere of central government the distinction between those different kinds of governmental activity was beginning to emerge at the close of the mediæval period;[2] it was becoming clearer in the sixteenth century;[3] and it was emphasized by the constitutional conflicts of the seventeenth century.[4] But, we have seen that, in the sphere of local government, the autonomy of its units and the survival of mediæval forms prevented the clear recognition of this distinction;[5] and it was perpetuated by the heterogeneous character of the powers which the justices of the peace possessed, to some extent by virtue of the commission of the peace, but mainly by virtue of the constantly increasing stream of statutes which conferred new powers upon them. The commission of the peace gave them large and indefinite powers to do all things necessary for the keeping of the peace. Certain statutes gave them large powers of control over the parish and its officials;[6] and very many statutes left the justices free to devise their own methods for enforcing them. In these circumstances it was only natural that these autonomous bodies should assume large powers to order the affairs of the districts subject to their jurisdiction; and that, in the exercise of these powers, they should sometimes transcend the sphere of administration, and take upon themselves to legislate. In some cases it is probable that these legislative orders were extra-legal, and, it may be, positively illegal.[7]

We have seen that by virtue of the general powers conferred on the justices of the commission of the peace they issued orders as to hawkers and pedlars, and as to holding of fairs, revels, and wakes, for which it would be difficult to find a legal justification;[8]

[1] Vol. ii 307-309. [2] Ibid 436-440. [3] Vol. iv 99-104, 184-186.
[4] Vol. vi 31, 85-86. [5] Above 151-153. [6] Vol. iv 156-157, 162.
[7] "We think that even the eighteenth century law courts must have held their orders, if they had been challenged, to have been either extra-legal—that is, not legally enforceable on any one who chose to disobey them—or else positively illegal—that is, in direct contravention of existing statutes," Webb, The Parish and the County 534.
[8] Above 152.

and we have seen that their power to deal with common nuisances was made the foundation of many detailed regulations.[1] In many places the justices assumed power to give orders as to the jurisdiction of the petty or special sessions of the justices, and as to their procedure.[2] On all matters relating to rating, to licensing, and to the poor law, the justices issued edicts which were legislative in character.[3] In the case of rating the justices made orders as to the basis of assessment. In the case of licensing they made all sorts of orders, imposing, e.g. the obligation of Sunday Closing and many other conditions, on the publicans. We have seen that, in the case of the poor law, the most striking instance is the famous Speenhamland order of the Berkshire justices, followed by many other benches of justices, as to the principles upon which out relief was to be given.[4] We have seen that many vestries were doing on a smaller scale for their parishes what the justices were doing on a larger scale for their counties.[5]

In all these various ways the units of local government used their autonomous powers to adapt the old machinery of local government to new conditions, and to give effect to the new machinery which Parliament had provided. Since the central government had neither the wish nor the power to superintend either the old or the new machinery, it was only through the skilful use by the units of local government of their independence and autonomy, that the old machinery of local government could be thus adapted to new conditions, and the new machinery could be put into motion; and, as we have seen, these units did not scruple to act extra-legally, and occasionally even illegally, to attain the results which seemed to them to be politically and socially expedient. The result of these activities was to help forward the development of local government law, by adding to the statute law a gloss of customary or conventional rules. Public law has been developed in this manner at many different periods;[6] but this manner of development is, as I have already pointed out,[7] especially characteristic of the public law of the eighteenth century. It is apparent both in the local and central government, and in the evolution of the powers and position of Parliament; because the weakness of the control of the central government made autonomy and independence as much the dominant notes of departments of the central government and of Parliament as of the units of local government.

But this autonomy and independence of the units of local government were subject to very real limitations both legal and

[1] Above 152.
[2] Webb, op. cit. 539-540; above 151-152.
[3] Ibid 540-550.
[4] Above 152.
[5] Above 153.
[6] Vol. vi 4-5.
[7] Above 220-222.

conventional. Without these limitations the English constitution and English public law of the eighteenth century would not have been fit to guide the destinies of a modern state. They were, however, very different from the limitations imposed by the bureaucratic pressure of our modern state. They did not destroy initiative, and they did not aim at producing a uniformity, which only appears natural and desirable, because we live in an age in which men's lives are standardized by machinery and scientific inventions. We shall now see that the eighteenth-century limitations subjected the units of local government to control, and linked them up with other parts of the constitution, but in such a way that their initiative and independence were not destroyed, and in such a way that their educational effect upon the many classes of Englishmen, who were called upon to take a share in many different capacities in the work of local government, was preserved. There was, as we shall see, a beneficial separation of powers in the relations of the local to the central government, and at the same time many links between these two sides of government. There was a separation of powers, but of a kind very different and very much more subtle than the separation outlined in Montesquieu's famous theory.

The Relations of the Local to the Central Government

In a modern state the independent and autonomous development of the organs of government must have limits. All the organs of government are part of the same constitution. They must work together; and, since they must work together, rules must be devised to settle their relations *inter se*. It was necessary, therefore, for the eighteenth-century statesman to devise rules to settle the relations between local and central government, just as we shall see that it was necessary for them to devise rules to settle the relations between different departments of the executive government,[1] the relations between the two Houses of Parliament,[2] and the relations between the executive government and Parliament;[3] for all these organs of government were autonomous bodies which were developing on their own lines.[4] It was a problem which was not so difficult to the eighteenth-century statesmen as it might at first sight appear. In the first place, the governing classes were, to a large extent, the homogeneous class of landed gentry with practical experience of government; and among such a homogeneous class of practical men conventional practices, which facilitate business, will easily grow up. In the second place, they were, as we have seen, familiar with

[1] Below 514-515.
[2] Below 626-629.
[3] Below 629-632.
[4] Above 220-222.

the creation and working of practical devices to facilitate the conduct of their own units of local government.[1] Therefore it was not difficult for them to devise or acquiesce in practical expedients to facilitate the harmonious working of different parts of the constitution of the state. In the third place, the governing classes were not only in agreement as to the necessity of maintaining the fundamental principles of the balanced English constitution, with its powers separated amongst different organs of government, they were enthusiastic admirers of it ; [2] and so there was a disposition on all sides to assent to the agreements and compromises and understandings which would make it work easily.

In the sphere of central government these causes give rise to conventions which were designed to facilitate harmonious relations between the executive government and Parliament ; [3] and between the two Houses of Parliament.[4] They testify to the genius for government possessed by a governing class educated, as a democracy can never be educated, by a training in the practical conduct of affairs, and by the responsibilities which the management of landed property entails. That governing class had got its training by its activities in the sphere of local government. In the eighteenth, as in earlier centuries,[5] it was the training in local government and local politics which fitted the members of the House of Lords and the House of Commons, and the men who held the great offices of state, to devise the conventions which made the constitution workable. This will be apparent if we examine the relations of the local government to various parts of the central government—to the executive, to Parliament, and to the courts. Those relations were partly conventional and partly prescribed by law ; and it is necessary to understand their nature, first, in order to appreciate an important side of the public law of the eighteenth century ; secondly, in order to understand the manner in which the foundations of important parts of the public law of the state were being laid ; and, thirdly in order to understand an important, though neglected, aspect of that separation of powers, to which all eighteenth-century statesmen and political thinkers agreed in ascribing the peculiar excellence of the English constitution. I shall therefore consider the relation of the local to the central government, and the effects of those relations, under the three heads of its relations (1) to the executive, (2) to Parliament, and (3) to the courts. In conclusion, I shall say something on the light which these relations shed on the nature of the separation of powers in the eighteenth-century constitution.

[1] Above 221. [2] Below 714-716. [3] Below 629-632.
[4] Below 626-629. [5] Vol. iv 180-181 ; vol. vi 80-81.

(1) *The Relations of the Local Government to the Executive.*

If we looked only at the letter of the law, we might suppose that the executive government in the eighteenth century had large powers over the organs of local government. The chief officials of the county—the lord lieutenant and the sheriff—and the justices of the peace, were royal officers who could be removed at any time by the King. They were subject, in the exercise of their jurisdiction, to the rulings of the courts of common law and the judges of assize. Through the judges of assize or otherwise the Privy Council could issue instructions to the justices of the peace. Moreover, counties and hundreds could be indicted and fined for the breach of the duties laid upon them by law.[1] We might suppose that in the eighteenth, as in the sixteenth and early seventeenth centuries,[2] the executive had many means of enforcing its wishes. But in reality these appearances are fallacious. The fall of the Star Chamber and the other conciliar courts had left the post-Restoration Privy Council very little coercive power; and its power had been still further diminished by the Revolution. We have seen that, when the county of Derby failed to comply with the Militia Acts of 1757, 1765, and 1769, the government was obliged to apply to the courts to issue a writ of mandamus; and that, even then, nothing was done until a second writ of mandamus was threatened.[3] The action sometimes taken by the judges of assize against the justices, or other organs of local government, who had neglected their duties,[4] was, in reality, a more effective form of control than that which the Privy Council or any of the officials of the executive government could exercise. That this was so was due to the fact that judicial control was, as we shall see,[5] the most effective control to which these organs of local government were subject.

Nevertheless we can discern the rise of certain kinds of conventional or extra-legal forms of control which established some very real links between the local and the central government. In the first place, the lord lieutenant was always a great nobleman, and, as such, always a member of the House of Lords, generally a privy councillor, and therefore in close touch with the King and the executive government;[6] and the fact that it had come to be the practice that the justices of the peace should, as a rule, be appointed on his nomination,[7] gave him, and, through

[1] Webb, The Parish and the County 306-307.
[2] Vol. iv 71-80; vol. vi 56-58.
[3] Above 156.
[4] Above 134.
[5] Below 243-249.
[6] Vol. iv 76-77; Webb, op. cit. 373-375.
[7] Vol. i 291.

him, the executive government, a certain measure of control over the rulers of the county.[1] It was partly for this reason that the victories of Whigs or Tories were, during the reigns of William III, Anne, George I, and George III, accompanied by the dismissal of some of the lord lieutenants.[2] In the second place, we have seen that the practice of appointing only country gentlemen to the office of justice of the peace made the governing classes very homogeneous.[3] As Francis Bacon had said in the seventeenth century "the noblemen and gentlemen were knit together."[4] This was even more true in the eighteenth century;[5] and since many of the nobles were lords lieutenant or privy councillors, this was a very real link, because it made it very improbable that the policy which the government wished to pursue would be distasteful to the justices. In the third place, it is true that these links, which united the organs of county government to the executive, were not so apparent in the boroughs, and especially in the larger boroughs. Nevertheless, similar links existed in the case of the smaller boroughs; and, in some of the larger boroughs, other links were forged. The Revolution had given the boroughs a larger measure of independence;[6] but we shall see that many of the smaller boroughs were under the influence of the noblemen and landed gentry;[7] and so the borough justices who, as we have seen,[8] were absorbing the control of the borough government, were brought under the control of the same homogeneous class as that which was dominant in the counties. In the larger towns the justices seem to have been as willing to listen to the advice of the Privy Council and the departments of

[1] Mr. Dowdell, Economic Administration of Middlesex, MS thesis, at p. 31 tells that in 1732-1733 quarter sessions appointed a housekeeper of Hicks Hall and a crier of the court on the recommendation of the Duke of Newcastle, the lord lieutenant, and secretary of state; and that "on another occasion it found that a man proposed by the Duke for the office of New Prison keeper could neither read nor write, and adjudged him unfit. There was a more suitable candidate, but the court deferentially suspended the appointment in order that certain justices might acquaint his Grace with the situation."

[2] Webb, op. cit. 374 n. 1; above 90. [3] Vol. i 291.

[4] Spedding, Letters and Life of Bacon vi 303, cited vol. i 291 n. 12.

[5] See Coxe, Three Centuries of Derbyshire Annals ii 301-302 for a remonstrance of the justices against a proposed appointment by the lord lieutenant on the ground that the proposed appointee, though of unexceptionable character and ability, was not of such a "situation in life" as "to entitle him to a place in the commission of the peace of this county conformably to those regulations under which his Grace's consideration has supplied and guarded it."

[6] "The shameless abuse by the last two Stuarts of the prerogatival processes whereby the medieval boroughs had been sometimes capriciously vexed and sometimes wholesomely controlled had this among its bad effects, that after a Glorious Revolution the corporations stood free from national supervision. No one was going to seize liberties or cancel charters any more; the ancient royal rights were dead and nobody was to revive them," Maitland, Township and Borough 95; for the Stuart manipulation of the boroughs see vol. vi 210-211.

[7] Below 561-563. [8] Above 140.

the central government as the county justices ; [1] and in London the relations between the City and the central government were necessarily very close.

The Lord Mayor was virtually the King's Lieutenant for the City of London ; he officiated at State functions, was in constant communication with the National Government, was occasionally summoned to meetings of the Privy Council, and was officially informed of important public events. The Court of Aldermen and the Court of Common Council had the right to access to the throne, and the Corporation could also appear by its Sheriff at the bar of the House of Commons, to ask for the redress of any grievance.[2]

The City Remembrancer acted as the agent of the Corporation for Parliamentary proceedings, and for negotiations with the Privy Council and the Treasury.[3] We have seen that, in the course of the eighteenth century, the government adopted the practice of paying a justice to whom it sent confidential communications, and entrusted the conduct of important criminal cases ; and that this was the germ from which sprang a new organization of the police, and the rise of the new order of stipendiary magistrates first in London and then in other towns.[4]

These were links which made for harmonious relations between the local and the central government. Let us look at two illustrations of their working. (i) Queen Anne's proclamations against vice and profaneness were not very efficacious in London and the larger towns ; [5] but they testify to a real religious revival, which took practical shape in the Society for the Reformation of Manners, and the more famous Societies for Promoting Christian Knowledge and for the Propagation of the Gospel in Foreign Parts.[6] Some benches of magistrates tried to enforce them ; [7] and, at the end of the century, under the influence of the Methodist revival of religion, there was a real attempt to give effect to similar proclamations, and to the injunctions based upon them, which were sent by the Home Secretary to the benches of magistrates.[8] (ii) A statute of 1744 [9] had empowered the justices, after punishing rogues and vagabonds, to send males over the age of twelve into the army or navy. Orders sent by the Privy Council in 1756 to Oxford, London, and other places, to put this statute in force, by im-

[1] See Webb, The Manor and the Borough 455 for complaints to the Privy Council against the Bristol gaol, which resulted in the town getting an Act to erect a new gaol at the expense of the ratepayers.

[2] Ibid 572-573. [3] Ibid 683. [4] Vol. i 146-148.

[5] Webb, The Parish and the County 335.

[6] G. M. Trevelyan, England under Queen Anne i 65-70.

[7] J. G. Atkinson, North Riding Sessions Records 183.

[8] Webb, The Parish and the County 406-407, 496 ; History of Liquor Licensing 50 seqq., and App. pp. 137-151 ; above 186.

[9] 17 George II c. 5 § 9.

pressing "loose and disorderly persons for His Majesty's service by sea and land" were speedily obeyed by the justices;[1] and similar orders were sent by the Privy Council during the American war of independence, and during the Napoleonic wars. In the former case the Marylebone magistrates, being stirred to action by a letter from the Duke of Northumberland as well as by a letter from the Privy Council, made special arrangements to carry out these orders. In the latter case, in 1803, the Buckinghamshire justices ordered a general search for idle and disorderly persons in order the better to comply with the orders which they had received.[2]

These links between the local and central government were, it is true, of a slight and a conventional character. They were very different from those which existed in the sixteenth and early seventeenth centuries, or in the latter part of the nineteenth century. But they were none the less real. They were in harmony with the political ideas of men who were jealous of entrusting power to the central government, and insisted on the retention by the organs of local government of a large measure of autonomy and independence; and of the political ideas of an age in which the control of the government was in the hands of the peers and the landed gentry, assisted, in the larger towns, by the great merchants. We shall now see that the links which united the local government to Parliament were stronger, and that those which united them to the courts were still more strong.

(2) *The Relations of the Local Government to Parliament.*

In 1617 Francis Bacon had remarked upon the intimacy of the relations between the local government and Parliament, and upon the reason for that intimacy. "Those that have voices in Parliament to make laws," he said, "they for the most part are those which in the country are appointed and administer the same laws."[3] This was even more true in the eighteenth century than in 1617. In the House of Commons the knights of the shire, and very many of the members for the smaller boroughs, were drawn from the same class of landed gentry as the class from which the justices of the peace were drawn; and we have seen that the House of Lords was composed of richer members of the same class.[4] The result was that Parliament was willing to increase the powers of the justices by general Acts; and, when at their request, it passed local Acts or Acts creating *ad hoc* bodies, it was equally willing to trust the control of these bodies to the

[1] Webb, The Old Poor Law 368. [2] Ibid 368-369.
[3] Speech in the Star Chamber, Spedding, Letters and Life vi 304, cited vol. iv 181.
[4] Above 239.

justices. " Parliament throughout this period seemed to imply, alike in the occasional general statutes and the multitudinous local Acts, that it assumed the court of Quarter Sessions to stand, towards the other local authorities of the county, in much the same position as is to-day occupied by the Home Office, the Board of Education, and the Local Government Board." [1]

In the case of general Acts it was a common practice to circulate proposed bills to the courts of quarter sessions; the House was unwilling to discuss such bills without a full attendance of knights of the shire; [2] and in 1790 a convention, consisting of two justices from each county, sat in London, drafted a vagrancy bill, and saw it through Parliament.[3] In the case of a local Act the promoters secured the services of a member to conduct it through the House; and he was usually appointed the chairman of the committee to which the bill was referred. The committee consisted of a varying number of members, and amongst them were the members for the county affected by the bill and the members for the adjoining counties.[4] The committee therefore varied in number according to the number of counties affected by the bill. Obviously in the case of local Acts, as in the case of general Acts, it was the policy of Parliament to give a full hearing to, and, if possible to carry out the wishes of, the members for the counties who applied to it for further powers. In fact the connection between these autonomous local governing bodies and Parliament was so close that the Webbs' statement with respect to general Acts, that " the House of Commons felt itself to be but the legislative clearing house of the several courts of Quarter Sessions," [5] applies *mutatis mutandis* also to local Acts.

We shall see that, in respect of local Acts, the committee stage in the House of Lords developed much earlier than it developed in the House of Commons, markedly judicial characteristics. The judges could be and often were consulted; local influences were not so prominent; and, at the end of the eighteenth century, we can see the origins of the powers of the Lord Chairman of Committees over this type of legislation.[6] In fact, just as the great peers, especially those who filled the

[1] Webb, The Parish and the County 554. [2] Ibid 554-556.

[3] 32 George III c. 45; Webb, op. cit. 555 and n. 1.

[4] F. H. Spencer, Municipal Origins 52-55; the statement of the Select Committee of the House of Commons in 1825 (Report of the Select Committee (Commons) on the Constitution of Committees on Private Bills, H.C. Reports, 1825, V, cited Spencer, op. cit. 55) represents the eighteenth-century practice—" under the present system each Bill is committed to the member who is charged with its management and such other members as he may choose to name in the House, and the members serving for a particular county (usually the county immediately connected with the object of the Bill) and the adjoining counties."

[5] The Parish and the County 554.

[6] Spencer, Municipal Origins 86-113; vol. xi 345-346.

office of lord lieutenant, left the actual conduct of county government to the justices, but exercised a general supervision over it ; [1] so the House of Lords left the promotion and framing of these local Acts to the House of Commons, but subjected them to a semi-judicial supervision.

The closeness and the harmony of the relations between the local government and Parliament was due to the similarity in their personnel. The fact that these harmonious relations existed had the beneficial result of ensuring a common action, directed to effecting those reforms in and additions to the system of local government, which social and economic changes demanded. Each helped the other, without any sacrifice of that autonomy and independence which was characteristic of both.

(3) *The Relations of the Local Government to the Courts.*

The most effective control to which the autonomous units of local government were subject was the control exercised by the courts of common law, and principally by the court of King's Bench.[2] It is true that the humbler units of local government, such as the parishes and the parochial officials, were subject to the administrative and the judicial control of the justices acting in or out of sessions.[3] But, subject to this qualification, it was the continuous control exercised by the courts of common law over all the units of local government, from the lowest to the highest, which was the principal factor in securing the regular working of these units within their appointed spheres, and in determining their relation to the central government. This control was almost entirely judicial in its character, and it was always applied through the machinery of judicial forms. Though the courts were able to exercise a control of an administrative character by means of the prerogative writs, as well as by means of indictments, informations, and civil actions, it was always exercised by means of a litigation in which the parties were publicly and orally heard ; and the courts were unwilling to interfere with purely administrative decisions of the justices where the law had given them a free discretion.[4] We shall see that the manner in which the relations of the local to the central government were determined by the action of the courts, sheds a

[1] Above 238-239, 241.

[2] Lord Hardwicke said in Ex parte Rook (1736) 2 Atk. 2 that "the power of the Court of Chancery, as to justices of the peace, extends only to putting them in commission ; but after they are once in the commission of the peace, this court has no right to punish them for any mal-behaviour ; the only redress is to move the Court of King's Bench for an information, and afterwards the complainants may apply to this court, to turn them out of the commission."

[3] Vol. iv 159, 162 ; above 155.

[4] Below 248, 251-252.

considerable light upon the nature and working of that eighteenth-century constitution of checks and balances and separated powers, which all Englishmen admired and many foreign publicists praised.[1]

We have seen that this control exercised by the courts of law manifested itself in three chief directions.[2] First, there was the control which was exercised by means of proceedings initiated in the name of the Crown either by indictment, by information, or by means of the prerogative writs. Secondly, there was the control exercised by means of proceedings initiated at the suit of private persons, either by setting in motion the machinery of indictment information or the prerogative writs, or by a civil action. Thirdly, there was the control exercised through the litigation arising from disputes between the different units of local government. The continuous exercise of these different forms of judicial control, and the growth in the elaboration of the law which was its necessary concomitant,[3] are, as we have seen,[4] the most striking of all proofs of the essential continuity of English public law. They show us that in the eighteenth, as in the thirteenth century, the judges were defining spheres of jurisdiction, and controlling the exercise of jurisdiction; and that they were, in consequence, producing uniformity in the rules of law.[5] Let us look at one or two illustrations of the activities of the eighteenth-century judges from these three points of view. They will show us that, though the eighteenth-century problems were necessarily different from the thirteenth-century problems, the principles applied by the judges, and the results of the application of those principles, were essentially similar.

(i) The judges defined spheres of jurisdiction. In 1700 Holt, C.J., pointed out that, on a conviction by a justice of the peace out of sessions, a certiorari lies, "for it is a consequence of all jurisdictions, to have their proceedings returned here by certiorari, to be examined here."[6] In the case of *R. v. Corden*[7] the court said that "a tight hand ought to be holden over these summary convictions; and it ought to appear to the court that the justice has jurisdiction in the case: they ought to be kept to a proper degree of strictness: and not to be made arbitrarily and without authority." It was because spheres of jurisdiction were defined by this writ that the courts interpreted very strictly

[1] Below 255-256, 714. [2] Above 156-158. [3] Below 256 seqq.
[4] Above 158. [5] Vol. ii 396-400.
[6] Groenvelt v. Burwell (1700) 1 Ld. Raym. at p. 469; he pointed out, ibid, that there was no need for a statute to give this jurisdiction to the King's Bench when it created a jurisdiction—"it is by the common law that this Court will examine, if other Courts exceed their jurisdictions"; cp. Rex v. Inhabitants of in Glamorganshire (1701) ibid 580.
[7] (1769) 4 Burr. at p. 2281.

any statutes which restricted their powers to issue it. They held that it was only by the plainest words that their power to issue a writ of certiorari could be taken away. Thus in 1760 [1] it was argued that the sixth and thirteenth sections of the Conventicle Act of 1670 took it away. The sixth section provided that no other court should meddle with appeals from convictions under this Act, but that they should be finally determined at quarter sessions only: and the thirteenth section provided that no proceedings under the Act should be impeached for want of form. "To what purpose," it was argued,[2] "should a certiorari issue when the Court can neither intermeddle with the fact or form"? But the court held that they had authority to issue the writ. "A certiorari does not go to try the merits of the question, but to see whether the limited jurisdiction have exceeded their bounds. The jurisdiction of this court is not taken away unless there be express words to take it away." [3] This rule was restated by Lord Kenyon, C.J., in 1800; and he said that "it was much to be lamented in a variety of cases that it was taken away at all." [4]

The writ of certiorari was not the only means by which the spheres of the jurisdiction of the justices were defined by the courts. They were further defined as the result of motions to quash the orders made by the justices; and two cases show that the control so exercised was very strict. In the case of *The Queen v. Bradley* [5] it appeared that quarter sessions had fined the overseers of highways £30 for not passing their accounts. This decision of quarter sessions was quashed because the statutory power to fine had been given, not to the quarter sessions, but to the special sessions. In the case of *The King v. Wakeford* [6] the court considered the question whether the justices or a court leet had power to appoint a constable; and it held that, though the justices had generally power to appoint, yet if, as in this case, a court leet had always appointed, the appointment of the justices must be quashed. Moreover, the point at issue in a civil action for false imprisonment might involve a decision as to the extent of the jurisdiction of the justices and other officials; and so the decision in such an action might have the effect of defining jurisdiction. This possibility is illustrated by the case

[1] Rex v. Moreley (1760) 2 Burr. 1040. [2] At p. 1041.

[3] At p. 1042; "and where a statute does not expressly and totidem verbis take away a certiorari, and direct 'that no certiorari shall issue,' the Court will grant one," ibid.

[4] The King v. Joseph Jukes (1800) 8 T.R. at pp. 544-545; cp. The King v. Allen (1812) 15 East 333 where it was held that a statute which provided that no certiorari shall be allowed to set aside any order of the sessions precluded the subject from using this remedy, but not the Crown, as the statute had not expressly taken away the Crown's prerogative to ask for the writ.

[5] (1713) Sessions Casses 11. [6] (1714) Sessions Cases 98.

of *Hill v. Bateman and Another*, the report of which runs as follows: [1]

Mr. Bateman was a justice of peace, and the other defendant was a constable, who had executed a warrant of commitment upon a conviction for destroying the game; without levying the penalty on the plaintiff's goods. It was agreed in an action of false imprisonment, that as to the constable the warrant was a sufficient justification; it being a matter within the jurisdiction of a justice of peace; but if a justice of peace makes a warrant in a case which is plainly out of his jurisdiction, such warrant is no justification to the constable.

It was subsequently held that on these facts the action lay against Bateman.[2]

And just as by these various methods, justices and others could be kept within their spheres of jurisdiction, so by the writ of mandamus they could be compelled to exercise their jurisdiction if a matter fell within it. The principle was broadly stated by Holt, C.J., in 1700; [3] and many cases illustrate its application. This is clear from the report of the case of *The King v. Mountague and Others*: [4]

Moved for a mandamus to be directed to the justices of peace to put in execution the Statute 8 H. 6 c. 9 of Forcible Entries, upon an affidavit that the entry was by force, and that the justices refused to proceed. The Court said that the writ had been often granted on the same reason in other cases, and a writ was granted absolutely; Hilary 2 Geo. I a mandamus was granted, directed to the justices of Derby, to put in execution the statute 1 Geo. I c. 14, to order the county treasurer to pay constables expenses and extraordinary charges; Mich. 6 Geo. I a mandamus was sent to the justices of Cheshire to reimburse the surveyors of the highways according to 3 and 4 W. and M. c. 12; Hil. 8 George a mandamus was granted to order Aldermen Barker to make a warrant of distress for the poor's rate; Easter 8 George mandamus was sent to Sir Thomas Clarges to pass overseers accounts according to 43 Eliz.; Easter 8 George mandamus to the justices of Nottingham to appoint overseers in an extra-parochial place.

(ii) The judges controlled the exercise of jurisdiction. The prerogative writs, and the other remedies open to aggrieved persons, were as efficacious for the purpose of controlling the exercise of jurisdiction as they were for the purpose of defining spheres of jurisdiction.

In 1797 Lord Kenyon, C.J., pointed out that orders and convictions made by magistrates in the exercise of their summary jurisdiction, could always be removed by writ of certiorari after

[1] (1726) Sessions Cases 99; cp. Shergold v. Holloway (1735) ibid 154—an action of false imprisonment against a tithingman.

[2] Ibid 107.

[3] "Where any Court is erected by statute, a certiorari lies to it; so that if they perform not their duty, the King's Bench will grant a mandamus," Groenvelt v. Burwell (1700) 1 Ld. Raym. at p. 469.

[4] (1729) Sessions Cases 106.

judgment, and that this was the only remedy in the case of summary proceedings; because they could not be questioned, as a judgment given on an indictment could be questioned, by a writ of error.[1] He said, further, "if any fraud or misconduct had been imputed to the magistrates in proceeding, notwithstanding the issuing of the certiorari, that might have been a ground for a criminal proceeding against them."[2] Lord Mansfield, in 1762, pointed out that the writ of mandamus had been "introduced to prevent disorder from a failure of justice and defect of police";[3] and that "within the last century it had been liberally interposed for the benefit of the subject and advancement of justice."[4] In particular, it was used to compel local authorities and others to obey the law as to the admission of officers, and to prevent them from using their powers over their members or servants oppressively. The writ, for instance was granted, "to admit lecturers, clerks, sextons, and scavengers, etc., to restore an alderman to precedency, an attorney to practice in an inferior court, etc."[5] It was also granted to prevent unjust dismissals from offices held during good behaviour.[6] The writ of habeas corpus was used to compel the justices to observe that meticulous regularity in their proceedings which, though it may sometimes have defeated justice,[7] yet helped materially to protect the liberty of the subject from encroachments at the hands of unlearned justices.[8] Thus, in 1770, Lord Mansfield discharged two prisoners convicted by Sir John Fielding of being loose, idle, and disorderly persons, because the warrant of commitment did not show on its face by whom the prisoners had been convicted.[9]

In some cases irregularities committed by justices of the peace and other officials might expose them to criminal proceedings. In 1721, in the case of *R. v. Newton*,[10] an information was granted against justices who had refused to give a certificate, as required by statute,[11] that a summons had been served on certain persons to take the oaths of allegiance, in order that further proceedings might be taken at quarter sessions. The facts were that the justices "coming afterwards to understand the party was a gentleman of fashion, and not suspected to be against the Government; lest a transaction of this nature should be an imputation upon him, they refused to give the prosecutor

[1] The King v. The Inhabitants of Seton (1797) 7 T.R. at pp. 373-374; cp. R. v. Corden (1769) 4 Burr. at p. 2281, cited above 244.
[2] 7 T.R. at p. 374. [3] Rex v. Barker (1762) 3 Burr. at p. 1267.
[4] Ibid. [5] Ibid.
[6] Rex v. Erasmus Warren (1776) 1 Cowper 370, see at p. 371 *per* Lord Mansfield.
[7] For an illustration see below 254 n. 1. [8] See vol. iii 619-620.
[9] Rex v. Francis York and Jane Fielding (1770) 5 Burr 2684 at p. 2686.
[10] (1721) 1 Stra. 413. [11] 1 George I St. 2 c. 13 § 11.

his oath of the service of such summons that the matter might go no further." In 1713 a churchwarden was indicted for not providing lodgings for a poor person.[1] In other cases these irregularities might expose officials to civil proceedings for assault or false imprisonment. In the case of *The King v. Symonds*,[2] the mayor of Yarmouth asked for an information against Symonds for striking him while in the execution of his office. The defence was that the mayor had struck the first blow. Lord Hardwicke, C.J., refused to grant the information, "for though a magistrate is protected by the law whilst in the execution of his office, yet in this instance he has forfeited that protection by beginning a breach of the peace himself." Presumably Symonds had a right of action against the mayor. In other cases the courts could quash orders made by the justices if their procedure had been irregular. Thus where quarter sessions, instead of assessing the proportions of the rate payable by two parishes, left the assessment to two justices, and confirmed their assessment without enquiry or examination, the court held the assessment bad, because quarter sessions had in fact delegated its authority, which it had no power to do.[3]

We shall see that the courts never attempted to override the discretion of the justices where they had been entrusted with discretion by the common law or by statute.[4] But they were always ready to act if there was any suspicion of corruption, oppression, or partiality. We have seen that in 1767 Lord Mansfield had stopped the abusive practice, followed by the City of London, of electing to the office of sheriff dissenters who could not comply with the Test Act, and then fining them for refusing to serve;[5] and there are many other cases in which the courts showed themselves ready to interpose to secure honesty in the exercise by the local authorities of their powers,[6] and purity in the administration of justice. In the case of *R. v. Young and Pitts*[7] a motion was made to the court of King's Bench to grant an information against two justices for refusing to grant a licence to Henry Day to keep an inn. The court refused to grant it; and, in refusing it, Lord Mansfield stated very clearly the principle upon which the court acted, when it was asked to exercise its jurisdiction to control justices and other officials of the local government. He said

[1] The Queen v. Charlton (1713) Sessions Cases 15.

[2] (1736) Cases t. Hardwicke 240.

[3] The King v. the Parishes of St. John and St. Mary (1714) Sessions Cases 21—it was said by Parker C.J. that, "it stands singly on the order of two justices, whereas their enquiry should have been preparatory only to the examination of the sessions, for they cannot delegate their authority."

[4] Below 251-252.

[5] Above 113; vol. xii 714.

[6] Below 250.

[7] (1758) 1 Burr 556.

that this Court had no power or claim to review the reasons of justices of peace, upon which they form their judgments in granting licences; by way of appeal from their judgments or overruling the discretion entrusted to them. But if it clearly appears that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion, and have (consequently) abused the trust reposed in them, they are liable to prosecution by indictment or information; or even, possibly, by action, if the malice be very gross and injurious.[1]

In the case of *R. v. Cozens*[2] he said, "no justice of the peace ought to suffer for ignorance, when the heart is right. On the other hand, when magistrates act from undue, corrupt, or indirect motives, they are always punished by this court." It is impossible to overestimate the value of this intelligent and impartial control over the many persons and bodies entrusted with large and ill-defined powers of local government. It was perhaps the principal cause of the very considerable success of the eighteenth-century system of local government, and of the large measure of popular approval which it received. We shall now see that it had effects no less salutary on the development of the law.

(iii) These activities of the judges produced uniformity in the rules of law. This phenomenon is apparent in two distinct but connected developments. In the first place, in older and more settled branches of the law it helped to preserve technical correctness and logical development. In the second place, it was laying the foundations of new branches of law.

The most striking illustration of the first of these effects is to be found in the control of the courts over the criminal jurisdiction of the justices. We have seen that the criminal law was one of the oldest and most highly developed branches of the common law; that it consisted of a number of common law principles which had been elaborated in many highly technical rules; that these principles and rules had been added to and complicated by a maze of statutes; and that the rules of criminal procedure and pleading were characterized by a pedantic formality and extreme verbal precision.[3] It is difficult to see how amateur justices could have applied this highly complex body of law without the constant supervision of the courts. That supervision had three salutary results. In the first place it prevented

[1] (1758) 1 Burr at pp. 561-562; in The King v. Tilsley (1740) Sessions Cases 89 an indictment was found against a clergyman of good credit for stealing a handful of hay not worth a penny; "the indictment was found against him at the sessions in the jurisdiction of Chipping Norton. . . . The case was spirited up by a town clerk who had charged the jury to find the bill, and therefore it was said defendant had no hopes of obtaining an impartial jury, if the indictment was to be try'd within the jurisdiction, since the town clerk returns the jury"; the court found no difficulty in making a rule to show cause why a certiorari should not issue.

[2] (1780) 2 Dougl. at p. 427; cp. R. v. Davie (1781) 2 Dougl. at p. 589; R. v. Brooke (1788) 2 T.R. at pp. 194-195.

[3] Vol. iii 276-277, 616-620; vol. viii 301-307; vol. ix 223-245.

many miscarriages of justice. The judges could quash indictments which, on the face of them, showed that no offence had been committed ;[1] or they could quash convictions where there had been obvious errors in procedure ;[2] or they could arrest judgment when the charge was so general that the court could not know what punishment to inflct ;[3] or they could allow a demurrer to an indictment which set out facts which did not amount to an offence,[4] or which was obviously defective in point of form.[5] In the second place, this supervision tended to make the justices careful not to strain their powers. Squire Western was induced to listen to the admonitions of his clerk, and to refrain from carrying into effect his resolution to commit his sister's maid to Bridewell for impertinent language to her mistress, because " he had already had two informations against him in the King's Bench, and had no curiosity to try a third." [6] In spite of this supervision, Fielding tells us that, in the execution of the game laws, " many justices of peace suppose they have a large discretionary power, by virtue of which under the notion of searching for and taking away engines for the destruction of game, they often commit trespass, and sometimes felony, at their pleasure." [7] It is clear that unless the courts had exercised their powers sternly and impartially the large powers of the justices might in many cases have become a tyranny of the worst kind. In the third place, we have seen that their supervision preserved the continuity and logical correctness of the principles of the law. That law no doubt erred on the side of technicality. It was so captiously formal that it gave many facilities for the escape of guilty persons.[8] But I cannot doubt that, in the eighteenth, as

[1] " Indictment against defendant, that he unlawfully suffered his fences to be down. . . . Exception; it is a non-feasance, and not indictable, therefore the indictment was quashed," The King v. Bingley (1714) Sessions Cases 25.

[2] A good illustration is the following list of objections to a conviction for selling brandy without a licence in 1734, which induced the court to quash the conviction: " Information says he sold by retail; but does not say what that retail was, and 2 Geo. 2 (2 George II c. 17) does not oblige persons to take a licence, unless to sell under a gallon; and a gallon is a retail measure; does not say oath was made of his being summoned; nor that it appeared to them he was summoned; not said when and where the defendant was convicted; nor to whom the forfeiture was to be paid; does not appear he permitted tippling in his house; does not appear that defendant dealt more in other goods; nor that it was a common tippling house; witnesses ought to be examined at the time of conviction, when a day was given to appear . . .; it is said he was summoned; but not said by whom, and the reason is because if he is not summoned, he might have an action against him for a false return of a summons," Sessions Cases 65.

[3] The King v. Gibbs (1723) Sessions Cases 76.

[4] The King v. Edwards and Others (1725) Sessions Cases 97.

[5] The King v. Stoughton (1731) Sessions Cases 132.

[6] Tom Jones, bk. vii chap. ix.

[7] Ibid.

[8] Thus in R. v. Sainthill (1706) 2 Ld. Raym. 1173 an indictment for the non-repair of a foot bridge was quashed because the bridge was described in the indictment as " pons pedalis which signifies a bridge of a foot long instead of pons pedestris."

in earlier centuries, these defects were out-weighed by the greater certainty in the law which was secured by the strictness with which it defined criminal offences; and by the consequent diminution of the risk, which is always present in the administration of the criminal law, that it will be applied arbitrarily and capriciously.[1]

The second of these effects can be seen in the growth of new bodies of public law. The fact that the administration by the justices and others of the poor law, of the law relating to rating, and of the law relating to highways, was supervised by the courts, was the reason why bodies of law on all these topics were beginning to make their appearance. Of this effect of the supervision of the courts I shall speak in the next part of this section.[2]

In these various ways the courts, all through this century, were, with some assistance from the Legislature, reducing to some sort of system the common law and statutory rules which regulated the duties and powers of the officials and bodies responsible for the working of the local government, and, by their action, they were laying the foundations of our modern local government law. Moreover, they were defining the position of the subject in relation to these officials and bodies. The legal result of their work was to bring the common law and statutory rules relating to local government into line with the principles of English law. The constitutional result of their work was to bring the institutions of local government into line with the different parts of the eighteenth century constitution of separated powers, in such a way that the balance of its separate parts was preserved. In fact, this supervision exercised by the courts over the conduct of local government, played no small part in so adjusting the relations between the separate parts of the eighteenth-century constitution, that they were able, in spite of their independence and autonomy, to work harmoniously together. Let us look for a moment at the effects of the supervision from this point of view.

In the first place, the courts upheld the autonomy and independence of the organs of local government. We have seen that they refused to interfere with the exercise by the justices of any discretionary power entrusted to them by the law, provided that their discretion was honestly exercised.[3] This principle was applied (*a*) to their judicial, and (*b*) to their administrative discretions. (*a*) *Judicial discretions.* In 1795, in proceedings on a certiorari to remove an acquittal by the justices,[4] the court pointed out that, in criminal cases,

[1] Vol. iii 619-620. [2] Below 256 seqq. [3] Above 248-249.
[4] The King v. John Reason (1795) 6 T.R. 375.

the evidence given was entirely and exclusively for the consideration of the justices below, who were placed in the situation of a jury; and as they had acquitted the defendant, this Court could not substitute themselves in the place of the justices acting as jurymen and convict him. That they could not judge of the credit due to the witnesses whom they did not hear examined, that they could only look to the form of conviction, and see that the party, if convicted, had been convicted by legal evidence.[1]

In 1761 the court laid it down that

even when a justice of peace acts illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill intention whatsoever, the Court will never punish him in this extraordinary course of an information; but leave the party complaining to the ordinary legal remedy or method of prosecution, by action or indictment.[2]

(*b*) *Administrative discretions.* With this kind of discretion the courts were even more reluctant to interfere. In 1713, on a question as to an appointment of overseers by the justices, it was said that the orders appointing them were "orders of regulation and not orders of judgment, as settlements, etc., and it is not usual for this Court to meddle with orders of regulation as for rates, etc."[3] In fact the courts were always reluctant to interfere with the discretion of the justices as to the procedure they adopted to assess a rate; and it was well settled that the courts would not as a rule allow a poor rate to be questioned by writ of certiorari.

If the rates were removable, the poor might be starved whilst the rates were depending here, and therefore the Court, from the great inconvenience that would attend the removal of the rates, have refused to do it.[4]

In the second place, in the interests of good government, the courts were prepared to give procedural advantages to the Crown and its servants. Thus, it was a well-established rule that, though a defendant could not get a writ of certiorari without showing some grounds for its issue, on the application of the Crown the writ was issued as of course, even though it was moved for by the Crown on behalf of a defendant.[5] This procedural rule enabled the Crown to protect its officials from proceedings in

[1] The King v. John Reason (1795) 6 T.R. at p. 376; cp. The King v. County of Oxford (1811) 13 East at p. 416 *per* Lord Ellenborough C.J.

[2] Rex v. Palmer and Baine (1761) 2 Burr 1162; cp. Rex v. Fielding (1759) ibid 719; Rex v. Benjamin Cox (1759) ibid 785.

[3] The Queen v. Searle (1713) Sessions Cases 13.

[4] The King v. the Justices of the Town of Salop (1734) Sessions Cases 73; cp. The King v. the Inhabitants of Clerkenwell (1715) ibid 30; in other classes of cases, however, these rates were questioned and sometimes quashed, below 289.

[5] Rex v. Inhabitants of Clace (1769) 4 Burr. at p. 2458 *per* Lord Mansfield C.J.; cp. The King v. Eaton (1787) 2 T.R. 89; The King v. Battams (1802) 1 East as p. 303 and n. (*d*).

the inferior courts. It was especially useful, for instance, in the case of proceedings against excise officers, when local feeling was aroused against them.[1] Similarly the courts were careful to protect constables, who had made an arrest under a probable and *bona fide* belief that a felony had been committed. In the case of *Ledwith v. Catch-pole* Lord Mansfield said :[2]

> The question always turns upon this, was the arrest *bona fide ?* Was the act done fairly and in pursuit of an offender, or by design or malice and ill-will ? Upon a highway robbery being committed, an alarm spread, and particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea-ports, it would be a terrible thing, if under probable cause an arrest could not be made : and felons are usually taken up upon descriptions in advertisements. Many an innocent man has been and may be taken up upon suspicion ; but the mischief and inconvenience to the public in this point of view are comparatively nothing. It is of great consequence to the police of the country.

In the third place, the courts always laid the greatest stress on the need to protect the liberty and rights of the private citizen. Not only was his liberty protected by the writ of habeas corpus, not only could he bring actions of trespass and false imprisonment against justices who had exceeded their powers, he could also indict them if their acts amounted to a criminal offence. Moreover, the courts would help him by granting informations against magistrates who had been guilty of an oppressive use of their powers. The case of *Rex v. Williams*[3] is a good illustration of the manner in which the courts used their powers to protect the rights of the subject. In that case the court granted an information against the justices of the borough of Penryn, because they had refused to grant licences to those publicans who had voted against the candidates for Parliament whom the justices had recommended. Lord Mansfield said that the Court granted the information " not for the mere refusing to grant the licence . . . but for the corrupt motive of such refusal ; for their oppressive and unjust refusing to grant them, because the persons applying for them would not give their votes for members of Parliament as the justices would have had them."

The number of remedies open to the aggrieved citizen, the meticulous adherence to correctness of form, and the encouragement of subtle verbal objections, which was fostered by the system of special pleading,[4] often pressed hardly on the justices

[1] The King v. S. Stannard (1791) 4 T.R. 161—motion by the attorney-general for a certiorari to remove an indictment against the defendant, an officer of excise, who, with two others, was indicted for riot and assault at the Dover Sessions ; see also Daniel v. Phillips (1792) ibid 499.

[2] (1783) Cald. at pp. 294-295.

[3] (1762) 3 Burr. 1317 ; cp. Rex v. Robert Hann and John Price (1765) ibid 1716 ; The King v. Holland and Foster (1787) 1 T.R. 692.

[4] See vol. ix 308-315.

and other officials. The protection given to the subject was so large that it sometimes hindered the administration of justice. An unscrupulous opposition could and did use legal technicalities to impede the regular conduct of county business. "In Feb. 1736-1737 the Middlesex quarter sessions sent a petition to the House of Commons explaining that two rates had been quashed and officers prosecuted for collecting them. Others had been removed and were liable to be quashed." They asked for a remedy—"considering the great niceties and forms requisite in such cases, although your petitioners have, by themselves and counsel, used their utmost care and caution therein, whereby it is become extremely difficult, if not impossible, for your petitioners to execute the trust reposed in them, or to make any contracts either for repairing county bridges or gaols or to support the continual charge of passing vagrants." [1] In answer to this petition Parliament passed the Act of 1739 consolidating the rates,[2] and putting some restrictions on the issue of writs of certiorari,[3] We have seen that, to some extent, other similar defects in the rules of the common law were remedied by a group of statutes which gave procedural advantages to the justices and some other officials.[4]

(4) *Local Government and the Separation of Powers.*

Both the courts and the Legislature thus attempted, not without success, to hold the balance between the conflicting interests of the executive government, of the local government, and of the subject. It was a difficult task, because all these bodies and persons had their separate and independent rights, powers, and duties. The courts preserved the separation and autonomy of the units of local government, and yet secured a certain measure of control over them. They upheld the large powers of the justices and other officials entrusted with the conduct of the local government, and yet secured the liberty and rights of the subject. Thus, they adjusted not only the rights and powers of very many separate bodies and separate interests, but also the rights and powers of the different units of local government *inter se*, and the rights and powers of the units of local government in their relation to the central government. We must now analyse the nature of this separation of rights and powers as between these different bodies and interests. This analysis will help us to understand the real character of that separation of powers as between the different parts of the central government, to which all writers attributed the excellence of the

[1] Dowdell, A Hundred Years of Quarter Sessions 127-128.
[2] 12 George II c. 29; above 170. [3] § 21. [4] Above 157.

eighteenth-century constitution ; [1] and the relation of the actual separation of powers in the English constitution, to the famous theory of the separation of powers which was put forward by Montesquieu.

We shall see that Montesquieu, in his book on *L'Esprit des Lois*, put forward the theory that it was to the separation of the legislative, the executive, and the judicial functions of the central government, that Englishmen owed their liberty.[2] But we shall see that, though there was a separation between the functions of the institutions of the central government on these lines, it was by no means the clear-cut separation which Montesquieu envisaged ; [3] and it is obvious that his theory is still less applicable to the functions of the organs of local government. We have seen that both quarter and petty sessions, in town and country alike, exercised functions which were legislative, executive, and judicial ; [4] and we have seen that some of the *ad hoc* authorities, such as the commissioners of sewers and the poor law incorporations, exercised a similar variety of functions.[5] There is little, if any, separation of powers in the functions of the organs of local government. Yet there is a sense in which there was a separation of functions in the eighteenth-century system of local government ; and it is necessary at this point to say a word about it, because it will help us to understand what is perhaps the most salient characteristic of the public law of the eighteenth century.

We have seen that all the organs of local government were independent autonomous bodies, not subject to any continuous supervision by the central government, but subject only to the legislative power of Parliament, and to control by the courts, if they infringed the law which defined their powers and duties.[6] It is true that quarter sessions exercised powers of supervision over the petty sessions, and that the actions of vestries were also controlled by the justices and quarter and petty sessions.[7] But their powers of control were limited and definite ; and, subject to that control, the petty sessions and the vestries could act freely and independently. It is true that the powers of these organs of local government varied. The powers of vestries and the officers of the parish were very much smaller than the powers of quarter sessions. But, within the sphere of their powers, they could act as they pleased, provided that they did not break the law.[8] Thus the system of local government was composed of a series of separate and autonomous organs. Because these organs were separate and autonomous, each, to some extent, acted as a check upon the others, and prevented the others from using

[1] Below 714-716. [2] Below 718. [3] Below 720-721.
[4] Above 151-152. [5] Above 203, 212-214. [6] Above 155-156.
[7] Above 155. [8] Above 153.

their large and undifferentiated functions tyrannically. Because the courts were always ready to interpose to prevent any encroachment by one of these organs on another, and because they were always ready to prevent any illegal action on the part of these organs, there was both an additional security against a tyrannical exercise of powers, and a security that these organs would not overstep the powers entrusted to them by the law.

This was the true sense in which there was a separation of powers in the system of local government. We shall see that it was very much more in this sense, and very much less in the sense indicated by Montesquieu, that there was a separation of powers in the system of central government.[1] But we shall also see that, because Montesquieu's analysis had an element of truth in it, and because it obtained a wide acceptance, it has had a considerable influence upon constitutional theory in England, and a considerable influence upon constitutional theory and practice abroad.[2]

But at this point I must return to the topic of the effect of the control of the courts upon the system of local government. We shall now see that to it is due the beginnings of special bodies of public law which are intimately related to this system.

The Beginnings of Special Bodies of Law connected with Local Government

We have seen that the mass of eighteenth-century statutes dealing with the multifarious topics which fell within the sphere of local government, were interpreted and applied both by the justices of the peace and by the courts of common law; and that their interpretation and application by the justices of the peace were supervised by the courts of common law.[3] These statutes were thus worked into the technical system of the common law; and, in cases in which they were based upon a foundation of common law principles, the statute law and the common law were fused together. The statutes bear witness to the growing elaboration of the law which was being caused by new social and economic needs; and the same causes gave rise to the elaboration and definition of older common law principles. It is for this reason that we can see, during this period, the beginnings of many of those special bodies of law connected with local government, which, under the influence of the same causes, have grown to large dimensions in modern times. Of these special bodies of law I propose to say something under the following four heads: The Poor Law; Rating; Highways; and Bridges.

[1] Below 720-721. [2] Below 719, 721-722. [3] Above 155-158, 243-254.

I. *The Poor Law.*

I have said something of the machinery of the poor law and its working—both of the ordinary machinery of the parish and the justices of the peace,[1] and of the special statutory authorities.[2] At this point I propose to indicate very briefly the evolution of some of the legal principles to which the working of this machinery was giving rise. These legal principles were being developed, by the combined efforts of the Legislature and the courts, into a body of very complicated, and sometimes irrational rules. Blackstone said of these rules that they were imperfect and inadequate.[3] But it must be admitted that his diagnosis of the causes of their imperfection and inadequacy is as inadequate and imperfect as the rules which he criticized.[4] In bulk, this body of law surpassed any of the other special branches of law connected with local government which were growing up in this century. We have seen that the space occupied by the title "Poor" in Burn's *Justice of the Peace* was by far the largest of all the titles in the book;[5] and during this century the bulk and complexity of the law gave rise to a special series of reports.[6]

Of all the various topics which were included in this branch of the law the topics of settlement and removal were the most intricate, and gave rise to the largest number of cases. I shall deal first with these two topics. Then I shall illustrate very briefly one or two other topics; and, lastly, I shall say something of the character of this branch of local government law.

Settlement and removal.

I have already said something of the origin of the law of settlement.[7] Here I must say something of the way in which this branch of the Poor Law, which was introduced in 1662 and regulated by later statutes,[8] was elaborated by the courts into a very complex body of law. Its complexity is due to the fact that statutes and decided cases added to the ways, and elaborated the conditions, in which settlements could be gained; and, consequently, "created an infinity of expensive law-suits between contending neighbourhoods concerning those settlements and

[1] Above 173-177. [2] Above 211-214. [3] Comm. i 365.

[4] He considered that the failure of the poor law was due (i) to the abandonment of the attempt to find profitable employment for those who were able to work—a principle to be found in the law of Alfred and the statute of 1601, Comm. i 361, 365; for the attempts made to do this and the reasons for their failure see above 176, 214; and (ii) to the law of settlement, Comm. i 361.

[5] Above 173. [6] For these reports see vol. xii 108.

[7] Vol. vi, 351-353. [8] Ibid 351-352.

removals " [1]—a litigation which Lord Mansfield justly said was a disgrace to the country.[2] It was inevitable in these circumstances that the overseers of rival parishes should resort to all sorts of sharp practices—paupers were sometimes offered sums of money by overseers if they would " by stealth and privately creep into " other parishes ; [3] and that their attention should be diverted from a consideration of the ways and means of maintaining the paupers to a consideration of the ways and means of getting rid of them.[4]

The Table[5] on the opposite page, which was prepared for the Select Committee on Settlement and Poor Removal, states the main heads of the law of settlement as it stood in 1847, and therefore gives us a convenient framework into which can be inserted a slight sketch of the evolution of some of the principal rules of this branch of the law.

The first three groups of these heads of settlement—birth, parentage, and marriage—arise from family relationships. The other groups can be classed under the three heads of contract —hiring and service, and apprenticeship ; property—renting a tenement, ownership of an estate, payment of rates ; and performance of public duties—serving a parochial office. But in the case of these three last-named qualifications for settlement, the person so qualified must also have been resident. Therefore, before dealing with these qualifications, it will be necessary to say something of the condition of residence.

(1) *Family relationships.*

Birth.—In the case of an illegitimate child the place of birth was the place of the child's settlement.[6] But there were various exceptions to this rule [7]—e.g. if the mother, before the birth, had been removed to a parish by order of the justices, and the child was born there, and then the order for removal was quashed.[8] If the mother afterwards acquired or was adjudged to have a settlement in a place other than that in which the illegitimate

[1] " After the restoration a very different plan was adopted, which has rendered the employment of the poor man difficult, by authorizing the subdivision of parishes ; has greatly increased their number, by confining them all to their respective districts ; has given birth to the intricacy of our poor laws, by multiplying and rendering more easy the methods of gaining settlements ; and, in consequence, has created an infinity of expensive law-suits between contending neighbourhoods, concerning those settlements and removals," Bl. Comm. i 362.

[2] The King v. Inhabitants of Harberton (1786) 1 T.R. at p. 140.

[3] Lipson, Economic History iii 464, citing Hertford County Records i 231.

[4] Ibid 463-464.

[5] I have taken this Table from Ed. Rev. lxxxvii 454.

[6] Whitechapel Parish v. Stepney Parish (1689) Carth. 433.

[7] For these exceptions see Burn, Justice of the Peace (ed. 1820) iv 201-205.

[8] Wood's Case (1699) 1 Salk. 121.

Head of settlement.	Origin.	Whether abolished and if so when.
Birth	Interpretation of the Courts of Law and ancient statutes	No
Parentage	Interpretation of the Courts of Law as to legitimate children, Statute as to illegitimate children	No
Marriage with reference to the wife	Interpretation of the Courts of Law	No
Hiring and service	Interpretation of the Courts of Law and Statutes	Abolished in 1834
Apprenticeship	Interpretation of Courts of Law and Statutes	Abolished as to sea service in 1834. Restricted as to parochial apprentices in 1844
Renting a tenement	Statute	No
Paying of parochial rates	Statute	Restricted in 1795. Not abolished
Serving a parochial office	Statute	Abolished in 1834
Estate	Interpretation of the Courts of Law	Restricted in 1722 and 1834. Not abolished
Certificates	Statute	Out of use

child was born, she could not be separated from her child, if it was under the age of seven years; but the child retained its birth settlement, and the parish where it was born was liable to maintain it.[1] In the case of a legitimate child the place of its birth was prima facie its place of settlement;[2] and the presumption could not be rebutted either if its father was settled

[1] Burn, op cit. iv 208-210; The King v. Inhabitants of Hemlington (1777) 1 Dougl. 9 n. 2; Simpson v. Johnson (1778) 1 Dougl. 7.

[2] Inhabitants of Spittlefields and St. Andrews Holborn (1701) Fort. 307; The King v. Inhabitants of Heaton Norris (1796) 6 T.R. 653.

there,[1] or if its father or mother had no discoverable settlement.[2]

Parentage.—A legitimate child thus took the settlement of its father.[3] The court of King's Bench said in 1732 that, if the father of a child had gained a settlement,

> his children, though born in another parish, shall be looked on as settled at the place of their father's last legal settlement, and shall be removed thither, as well after the death of their father . . . as in his lifetime, supposing they have gained no settlement of their own.[4]

Thus if there was grandfather, father, and son, and there was no proof that the father had ever gained a new settlement, it might be necessary to enquire into the grandfather's settlement in order to ascertain that of the son.[5] A legitimate child would take its mother's settlement if the father's settlement was not discoverable ;[6] and, if the father died and the child lived with the mother, it acquired any new settlement acquired by her,[7] other than a new settlement acquired by a second marriage.[8] A settlement arising from parentage lasted till the child was " emancipated," that is till he separated from his family and acquired a new settlement of his own.[9] It was held in earlier cases that marriage and living separate from his old family, and later that marriage alone, operated as an emancipation, so that the child's settlement would not follow a settlement subsequently acquired by its father.[10] But it would be otherwise if the child went on living with his father as part of his family.[11]

Marriage.—A woman marrying a man with a known settlement acquired that settlement.[12] But her original settlement was only suspended, so that if the husband had no settlement, and he deserted her or died, her original settlement revived.[13] This

[1] If the father was settled there the children got their father's settlement, Inhabitants of the Parish of St. Giles, Reading v. Inhabitants of the Parish of Eversley, Blackwater (1732) 2 Ld. Raym. 1332.

[2] Whitechapel Parish v. Stepney Parish (1689) Carth. 433.

[3] See Parish of Cumner v. Parish of Milton (1704) 2 Salk. 528.

[4] Inhabitants of the Parish of St. Giles, Reading v. Inhabitants of the Parish of Eversley, Blackwater (1732) 2 Ld. Raym. at p. 1332.

[5] See The King v. Inhabitants of Bucklebury (1786) 1 T.R. 164, where it was necessary to consider the settlement of the paternal grandfather; a lawyer said in 1852 that he had known two cases in which it had been necessary to consider the settlement of a great-grandfather, Webb, The Old Poor Law 334 n. 1.

[6] Burn, op. cit. iv 217-218.

[7] Ibid 218.

[8] Anon. (1699) 2 Salk. 482.

[9] Burn, op. cit. iv 220-236.

[10] The King v. Inhabitants of Everton (1801) 1 East 526, and see at p. 527 n. (*a*).

[11] The King v. Inhabitants of Sowerby (1802) 2 East 276.

[12] Burn, op. cit. iv 236.

[13] Ibid 237-238; Burrow, Settlement Cases 124, says that the case of Shadwell v. St. John's Wapping (1723), in which this point was decided, was reported in the following catch :

[*Continuation of footnote on opposite page.*

method of gaining a settlement made it necessary to consider the whole topic of the forms required by law for a valid marriage. For this reason Burn inserts in his book the whole of Lord Hardwicke's Marriage Act,[1] and a discussion as to the validity of Gretna Green marriages.[2]

(2) *Residence.*

We have seen that under the legislation which was enacted between 1662 and 1698, a person could gain a settlement by forty days' residence; and that the forty days ran from the giving of a notice by the resident to the overseers.[3] But this mode of gaining a settlement by forty days' residence and notice was abolished in 1795.[4] We have seen also that, if a person came into another parish with a certificate from his parish of settlement, he could not be removed till he became chargeable to the parish, and that then the parish giving the certificate must relieve him.[5] But the grant of a certificate might be disadvantageous to the parish which gave it;[6] much litigation took place as to the effect of these certificates—what persons were covered by them,[7] upon what parishes they were binding,[8] and when they were discharged;[9] and the movements and activities of these certificated persons often gave rise to troublesome and intricate controversies.[10] It is not surprising therefore that the practice of giving them went out of use. But it was not necessary in all cases that a resident for forty days

> A woman having a settlement
> Married a man with none:
> The question was, he being dead,
> If that she had, was gone?
> Quoth Sir John Pratt—Her settlement
> Suspended did remain,
> Living the husband; But, him dead,
> It doth revive again.
>
> *Chorus of Puisne Judges*
>
> Living the husband; But, him dead,
> It doth revive again.

The law was finally settled in this way in The King v. Inhabitants of St. Botolph (1755) Burrow, Settlement Cases, 367.

[1] Burn, op cit. iv 245-247.

[2] Ibid 249-251; in the case of Compton v. Bearcroft (1769) 2 Hagg. Con. 443, 444, it was decided that they were valid; cp. Dalrymple v. Dalrymple (1811) 2 Hagg. Con. 54; Ruding v. Smith (1821) 2 Hagg Con. at p. 376 *note;* vol. xi 609 n. 7.

[3] Vol. vi 351-352.

[4] 35 George III c. 101 § 3; for the reason why it was abolished see below 266.

[5] Vol. vi 352-353.

[6] See Adam Smith, Wealth of Nations (Cannan's ed.) i 141, and the passages from Burn there cited.

[7] Burn, op. cit. iv 568-571. [8] Ibid 573-574. [9] Ibid 576-585.

[10] See e.g. R. v. Spotland (1765) Burr. Settlement Cases 527; The King v. Inhabitants of Leek Wootton (1812) 16 East 118.

should give notice in order to gain a settlement. Residence for forty days would give a settlement if it was a residence coupled with any one of the three following groups of circumstances, which comprise the remaining heads of settlement. We shall now see that all of these groups of circumstances gave rise to large bodies of case law. Moreover, in all of them the requirement of forty days' residence gave rise to many difficulties, especially where there had been a change of residence from time to time, or where for any reason it was not clear in which parish the pauper had resided for the forty days.[1] The case described in an amusing passage from Crabbe Robinson's Diary, which is cited by the Webbs, is a good illustration of the many difficulties which, as the result of this legislation, were brought before the courts.[2]

(3) *Contract.*

Hiring and service.—If an unmarried person, without children, was hired for a year, and served his employer for the whole year, he gained a settlement in the parish in which, during that service, he had resided for forty days.[3] If, during the service, he resided in several parishes for forty days, his settlement was in the parish where he spent the last night.[4] This qualification gave rise to an immense mass of decided cases. Such questions as whether a marriage entered into during the service defeated the settlement;[5] when the courts would presume a contract for a year's service from the facts;[6] what was the meaning of a hiring for a year;[7] would a hiring for a sum to be regulated by the amount of work done be sufficient;[8] the distinction between a contract of hiring and a contract of apprenticeship;[9] would a hiring for a year with liberty to be absent for a month in the

[1] See Burn, op. cit. iv 358-371, 401-411, 489-494, 539-542.

[2] "I spent several hours at the Clerkenwell Sessions. A case came before the Court ludicrous because of the minuteness required in the examination. Was the pauper settled in parish A or B? The house he occupied was in both parishes, and models of both of the house and of the bed in which the pauper slept were laid before the Court that it might ascertain how much of his body lay in each parish. The Court held the pauper to be settled where his head (being the nobler part) lay, though one of his legs at least, and a great part of his body, lay out of the parish," Diary, by Thomas Sadler (3rd ed.) 264, cited Webb, The Old Poor Law, 347 n. 2; for cases which involved enquiries of this kind see The King v. Inhabitants of St. Mary Lambeth (1799) 8 T.R. 240.

[3] 3 and 4 William and Mary c. 11 § 7; 8, 9 William III c. 30 § 4; it was enacted by 12 Anne Stat. 1 c. 18 § 2 that if a person were hired by or apprenticed to a person who resided in a parish under a certificate, the servant or apprentice should not gain a settlement by service or apprenticeship.

[4] The King v. Inhabitants of Hulland (1781) 2 Dougl. 657; residence for forty days, even if the master only came to the place for a visit, sufficed, The King v. Inhabitants of St. Peters (1722) 1 Stra. 524; Burn, op. cit. iv 360-368.

[5] Ibid 262-263. [6] Ibid 270-275. [7] Ibid 275-284.

[8] Ibid 284-285. [9] Ibid 286-290; below 263.

year suffice ; [1] would absence allowed by the master, or taken by the servant and condoned by the master, prevent a settlement being gained ; [2] when would a hiring at weekly wages suffice ; [3] would a retrospective hiring for a year, i.e. hiring for a year part of which was past at the date of making the contract, suffice ; [4] when was the contract dissolved within the year, so that no settlement was gained [5]—these are a few specimens of the many riddles to which this qualification for settlement gave rise. In addition there were a whole series of cases which turned on the requirement of forty days' residence under the contract.[6]

Apprenticeship.—It was enacted in 1691 that if a person were bound apprentice by indenture, and inhabited in any town or parish, such binding and habitation would give a settlement.[7] The object of this legislation was, as Blackstone says, "to encourage application to trades and going out to reputable services." [8] Many difficulties arose in construing these enactments. Questions arose as to the form of the contract ; [9] as to the validity of contracts made by infant masters or infant apprentices ; [10] and as to the effect of a deed of apprenticeship which was for a less period than the seven years prescribed by the statute of 1563.[11] On this last question the court held that the contract was not void, but voidable by the master or the apprentice, so that a parish could not take advantage of the informality to dispute a settlement gained under it—the parish, as Lord Hardwicke, C.J., said, had had the benefit of the service of the apprentice.[12] A large number of cases turned on the binding of apprentices by parishes,[13] and on the interpretation of the Acts which imposed stamp duties on indentures of apprenticeship.[14] Another line of cases elucidated the difference between contracts of hiring and service and contracts of apprenticeship. The governing consideration was the intention of the parties to the contract. If the main object of the contract was to teach a trade the contract was one of apprenticeship ; and if the contract was defective as a contract of apprenticeship, it could not be given validity by construing it as a contract of hiring and service.[15] Lastly a number of cases turned upon the effect of service with different masters with the consent of the original master ; [16] with the effect of an assignment of the

[1] Burn, op. cit. iv 296. [2] Ibid 327-329. [3] Ibid 303-307.
[4] Ibid 311. [5] Ibid 340-358. [6] Above 262.
[7] 3 William and Mary c. 11 § 8 ; for the law as to the apprentices to persons who lived in a parish under a certificate see above 262 n. 3.
[8] Comm. i 364. [9] Burn, op. cit. iv 378-379. [10] Ibid 379.
[11] 5 Elizabeth c. 4 ; for this statute see vol. iv 341-342.
[12] St. Nicholas Parish v. St. Peter's Parish (1737) Burn, op. cit. iv 382.
[13] Ibid 383-386. [14] Ibid 386-395.
[15] The King v. Inhabitants of Laindon (1799) 8 T.R. 379.
[16] Burn, op. cit. iv 411-424.

indenture of apprenticeship ; [1] and with the circumstances which would operate to dissolve the contract, and so prevent the apprentice from gaining a settlement.[2]

(4) *Property.*

Renting a tenement.—The statute of 1662 enacted that persons coming to settle in a tenement under the yearly value of £10 might, within forty days, be removed to the place where they were legally settled ; [3] a statute of 1698 enacted that a certificated person could gain a settlement only by holding a tenement of £10 yearly value, or by holding an annual office in the parish ; [4] and the conditions under which a settlement could be gained by this method were made considerably more strict by a statute of 1819.[5] There is a very large body of cases turning on the question, what is a tenement ? The courts from the first construed the term very widely.[6] It was not necessary that any right to the soil should be given. "Anything is a tenement which is a profit out of the land," [7] e.g. fisheries,[8] the right to take sand or gravel,[9] a cattle-gate,[10] a right of common,[11] market tolls,[12] a warren,[13] and even renting twenty cows at £3 10s. a year each, the cows to be fed in certain ground belonging to their owner, exclusively of other cattle.[14] On the other hand, the occupation of premises by a servant, for the better performance of his duties as servant, would not give a settlement under this head.[15] Another group of cases turned on the requirement that the tenement must be of the value of £10 or over. The rent paid was not material if the value was £10 or over ; [16] and the tenement must be of the value exclusive of the stock upon it.[17] Several tenements in different parishes sufficed, if their combined value was £10 or over.[18] Conversely, if a tenement was

[1] Burn, op. cit. iv 424-429. [2] Ibid 429-434.
[3] 14 Charles II c. 12 § 1 ; vol. vi 351-352.
[4] 9 William III c. 11 ; vol. vi 352.
[5] 59 George III c. 50 ; the tenement must consist of a dwelling-house or building, or of land, or both ; it must be *bona fide* hired at a rent of £10 a year ; it must be hired and occupied for a whole year ; the rent must be paid for a whole year ; the whole of the tenement must be in the parish in which the tenant resided.
[6] "From the passing of the statute of Car. 2 to the present time, the construction put on it has been what is called a liberal construction, in order to confer a settlement on those persons who have the ability to take a tenement," The King v. Inhabitants of Tolpuddle (1792) 4 T.R. at pp. 674-675 *per* Lord Kenyon C.J.
[7] "Anything is a tenement which is a profit out of the land. In order to take a tenement it is not necessary that the party should have the fee simple or the fee tail; any minute interest in land is parcel of a tenement. Such minute interest indeed cannot be entailed ; but all the parcels when consolidated together, may," ibid, at p. 675.
[8] Burn, op. cit. iv 447. [9] Ibid 448. [10] Ibid.
[11] Ibid 449. [12] Ibid. [13] Ibid 447.
[14] The King v. Inhabitants of Tolpuddle (1792) 4 T.R. 671.
[15] Burn, op. cit. iv 461-462. [16] Ibid 465-466.
[17] Ibid 466. [18] Ibid 472-473.

hired jointly by two tenants, each part of it must, when divided be of the value of £10.[1]

Ownership of an estate.—The possession of a freehold or copyhold estate of any value, and residence thereon for forty days, would give a settlement, "if it be acquired by act of law or of a third person as by descent gift devise etc." [2] But, "if a man acquire it by his own act, as by purchase (in its popular sense, in consideration of money paid) then unless the consideration advanced, *bona fide*, be £30, it is no settlement for any longer time than the person shall inhabit thereon." [3] It followed that a person thus inhabiting premises purchased by him for less than £30 was, during his inhabitancy, irremovable—he could not be removed from his own property; [4] but he was not, as Blackstone says, "by any trifling or fraudulent purchase of his own to acquire a permanent and lasting settlement." [5] Thus a distinction was introduced between a legal settlement and the status of irremovability.[6] The complications of the land law ensured a large crop of cases upon the question whether any given interest in land gave a settlement; and the most technical parts of the land law were sometimes discussed in these cases. A case heard in 1725 involved a discussion of the length of possession which would bar an action of ejectment, the effect of a descent cast, and the nature of an estate gained by a disseisin.[7] Other cases turned on the interest taken by executors or administrators,[8] on the interest conferred by an estate vested in trustees to the separate use of a married woman,[9] the interests taken in different circumstances by mortgagors and mortgagees,[10] the effect of the residence of a guardian in socage on his ward's estate.[11] It was held that if a certificated person purchased, or acquired by act in the law, an estate, he was thereby made capable of acquiring a settlement.[12]

Payment of rates.—It was enacted in 1691 that a settlement

[1] Burn, op. cit. iv 477-478. [2] Bl. Comm. i 364.

[3] Ibid; 9 George I c. 7 § 5.

[4] "Having land in a parish will not make a settlement, but living in a parish where one has land will gain a settlement without notice; for the Act of Parliament never meant to banish men from the enjoyment of their own lands," Parish of Ryslip v. Parish of Harrow (1697) 2 Salk. 524 *per* Holt C.J.; R. v. Inhabitants of Aythorp Rooding (1757) Burn, op. cit. iv at p. 534.

[5] Comm. i 364.

[6] Burn, op. cit. iv 533-535; Halsbury, Laws of England (1st ed.) xxii 591-592.

[7] Parish of Ashbrittle v. Parish of Wyley 1 Stra. 608.

[8] Burn, op. cit. iv 498-499. [9] Ibid. 504-505. [10] Ibid 518-520.

[11] "The law considers a guardian in socage as entitled to the possession of the ward's property, and incapable of being removed from it by any person. Such a guardian has not a mere office or authority, but an interest in the ward's estate," The King v. Inhabitants of Oakley (1809) 10 East at p. 494 *per* Lord Ellenborough C.J.; this is an interesting survival of the old idea that guardianship gives the guardian a profitable right, see vol. iii 511-513.

[12] Burn, op. cit. iv 535-539.

could be acquired by residence in a town or parish, coupled with assessment to and payment of the public taxes or levies of that town or parish.[1] In 1795 it was enacted that the taxes must be paid in respect of a tenement of the yearly value of £10 or more.[2] The reason for the change was this: the Act of 1795 had taken away the power to remove persons likely to become chargeable, and had made them irremovable till they actually became chargeable.[3] It was therefore expedient to prevent persons likely to become chargeable from getting a settlement by forty days' residence in a tenement of small value, coupled with the payment of rates and taxes.[4] It was for the same reason that this statute abolished the rule that forty days' residence coupled with notice gave a settlement.[5] If that rule had not been abolished, a person might have given notice, resided for forty days, abstained from asking relief till after the forty days, and have then acquired a settlement. "Wherever the change in the law from probable to actual chargeability enabled persons who were likely to become chargeable to obtain settlements by preventing the parish officers from removing them during forty days, those settlements were abolished."[6] A number of questions arose as to the interpretation of the statute of 1691. It was held that the person claiming a settlement must have been the person who was assessed and the person who paid, so that if the landlord was assessed and the tenant paid, the tenant gained no settlement;[7] and the person assessed and paying must be the occupier.[8] If these requirements were fulfilled, the fact that the landlord refunded the amount of the rate to the tenant was immaterial.[9] There was also litigation as to what rates and taxes would enable a person to gain a settlement.[10]

(5) *The performance of public duties.*

It was enacted in 1691 that if a resident in a town or parish, for himself and on his own account, executed any public annual office or charge in the town or parish for a year, he should gain a

[1] 3 William and Mary c. 11 § 6. [2] 35 George III c. 101 § 4. [3] § 1.

[4] "If a person came to settle on a tenement under £10, he would, by the old law, be removable if likely to become chargeable; but if he was rated, and paid rates in respect of it for forty days, and was not during that time actually chargeable, he might become settled in the parish, and demand relief on the forty-first day," note to The King v. Inhabitants of St. Pancras (1823) 2 B. and C. at p. 128; this case overruled the opinion of Lord Kenyon C.J. in The King v. Inhabitants of Islington (1801) 1 East at p. 284, and Lord Ellenborough C.J. in The King v. Inhabitants of Penryn (1816) 5 M. and S. at p. 445 that it was intended to abolish this head of settlement.

[5] 35 George III c. 101 § 3; above 261.

[6] Note to The King v. Inhabitants of St. Pancras (1823) 2 B. and C. at p. 128.

[7] Burn, op. cit. iv 552. [8] Ibid 552-553. [9] Ibid 555.

[10] Ibid 556-559; it was enacted by 9 George I c. 7 § 6 that assessment to and payment of a scavenger's rate and a highway rate should not give a settlement.

settlement.[1] There are a large number of cases upon the question what offices come within this enactment. It was held to include the old unremunerated offices such as those of constable,[2] tithing man,[3] hog-ringer,[4] ale-taster,[5] warden of a borough,[6] borsholder,[7] hayward;[8] and it was also held to include the collectors of land tax,[9] and the offices of parish clerk and sexton.[10] But it did not include a curate,[11] who might be dismissed at any time, or a master of a workhouse who had his post merely by contract with the parish and could be dismissed within a year.[12] In fact, the courts drew a distinction between an employment under a contract which would not give a settlement, and an annual office or charge, which would;[13] and this distinction ruled out a large number of the more modern paid officials.

The topic of removal is a necessary concomitant to the topic of settlement. Except in those cases in which a person without a settlement was irremovable,[14] a person who was living in a parish in which he was not settled, could be removed to his parish of settlement. Before 1795 he could be removed if he was likely to become chargeable: after 1795 he could only be removed when he actually became chargeable.[15] Very many questions arose as to the power to remove—the conditions under which a wife could be removed without her husband;[16] the application of the rule that a servant could not be removed from his or her master;[17] the rule that a person casually in a parish with no *animus manendi* could not be removed;[18] the places to which a removal could be ordered to be made.[19] A very much larger number of questions arose on purely procedural points—the need for a complaint to ground the jurisdiction;[20] the number of justices who must be present;[21] the need to state that one of them was of the quorum;[22] the need to state of what county the

[1] 3 William and Mary c. 11 § 6. [2] Burn, op. cit. iv 542-543.
[3] Ibid 545. [4] Ibid 546. [5] Ibid 547.
[6] Ibid 545. [7] Ibid 546.
[8] Ibid; see The King v. Inhabitants of Whittlesea (1792) 4 T.R. at p. 808 *per* Lord Kenyon C.J.
[9] Burn, op. cit. iv 548. [10] Ibid 543, 544. [11] Ibid 543. [12] Ibid 548-549.
[13] "There is a difference between an employment created by the parties themselves, which they may put an end to whenever they please, and that which exists or is created by law. Now this man [a master of a workhouse appointed pursuant to 9 George I c. 7 § 4] was in the former situation. It was in the option of the overseers and parishioners to have such a person in such an employment or not; and they could put an end to the employment altogether whenever they pleased. It was created by themselves and depended upon their contract. I cannot therefore call this an office or charge within the meaning of the Act of Parliament," The King v. Inhabitants of Mersham (1806) 7 East at pp. 173-174 *per* Le Blanc J.
[14] Above 266. [15] 35 George III c. 101 § 1.
[16] Burn, op. cit. iv 601-606. [17] Ibid 606-609. [18] Ibid 612-613.
[19] Ibid 617-619. [20] Ibid 619. [21] Ibid 620.
[22] "An abundance of orders formerly have been quashed for not setting forth that one of the justices was of the *quorum*; but now by stat. 26 Geo. 2 c. 27 no order shall be set aside for that defect only," ibid 622.

justices were who made the order;[1] the description of the paupers;[2] the need for a specific adjudication that the pauper was likely to become chargeable, and that his settlement was in the parish to which he was to be removed.[3] Other questions arose as to the evidence admissible;[4] as to the procedure on appeals;[5] as the conclusive effect of an order of removal,[6] and the conclusive effect of confirming or quashing an order on the merits,[7] or of quashing an order for defects of form.[8] Further questions arose as to special cases stated by the justices. In that connection it should be noted that there was no machinery to compel the justices to state a case,[9] and that their rulings could not be questioned by a bill of exceptions.[10] The only remedy against an erroneous ruling, if the justices refused to state a case, was some one of the prerogative writs—generally the writ of certiorari. But in cases where the pauper had been wrongfully imprisoned, he might get a remedy by way of criminal information against the justices, or by an action for damages. Such cases might occur because, if a pauper returned after he had been removed, the justices could send him to the house of correction. The cases show that the courts kept a very tight hand over the way in which the justices exercised this jurisdiction;[11] and that here, as in other cases,[12] the insistence by the courts on the observance of the technical rules of procedure was a protection against injustice inflicted carelessly or maliciously.

We have seen that, as early as the end of the seventeenth century, the economists objected to the law of settlement and removal, because it interfered with the mobility of labour, at a time when the growth of the capitalistic organisation of industry was demanding mobility.[13] We shall see that these objections were voiced more and more forcibly as, with the coming of the industrial revolution, the purely economic point of view was elaborated;[14] but we shall also see that these purely economic objections were sometimes expressed in too exaggerated a form.[15]

[1] Burn, op. cit. iv 623-624. [2] Ibid 624-625. [3] Ibid 625-627.
[4] Ibid 630-631. [5] Ibid 652-662. [6] Ibid 666.
[7] Ibid 670-673. [8] Ibid 673-675. [9] Ibid 678-679.
[10] Ibid 679; for the bill of exceptions see vol. i 223-224.
[11] In The King v. Angell (1735) Cases t. Hard. 124 a pauper returned after being removed, and the defendant, a justice of the peace, "without summons or oath made of his return," sent him to the house of correction where he was detained three days. The court held that "the sending him to the house of correction was punishing him, after having convicted him unheard, and that is contrary to natural justice; and thereupon, upon the authority of the case of the justices of Hertford, they were for granting the information: but as no malice appeared in the justice, the court allowed the prosecution to accept of some proposals made by the justice, to make him amends; and so it went off"; cp. Baldwin v. Blackmore (1758) 1 Burr. 595 where a pauper recovered damages for false imprisonment largely because the warrant of commitment was technically irregular, see at pp. 602-603 *per* Lord Mansfield C.J.
[12] Above 250-251. [13] Vol. vi 352-353.
[14] Vol. xi 391-392, 501-502. [15] Vol. xi 514-518.

Though they eventually secured some small modifications of the law of settlement, they did not secure its abolition. Its complete abolition would only have been possible if the Legislature had abandoned the view that poor relief was a local service connected with the parish, and had adopted the view that it was a national service to be administered as by a department of the central government. The economists were not the only critics of this branch of the law. We have seen that some of the lawyers were equally critical of the results which the combined efforts of the Legislature and the courts had achieved;[1] and there is no doubt that their critical attitude was abundantly justified. The law of settlement was technical and complex; it encouraged litigation at the public expense; and it was cruel to the poor. In 1775 Gilbert, in moving for a committee on the poor laws, said of the law of settlement that it had produced "nothing but frauds, perplexities and endless confusion."

> The great struggle now is between parish and parish; every artifice is used, every endeavour exerted, by the parish officers, often with great inhumanity to the poor, to ease their own parish, and lay the burden upon their neighbours. The poor are harassed by removals from place to place, which deprive them of all rest and comfort; litigations are encouraged; great sums spent in support of them . . .; the real purpose for which that heavy tax is laid, viz. the maintenance and relief of the indigent and necessitous poor, is but little regarded.[2]

So profitable was this litigation to the lawyers that they were sometimes accused of opposing reforms which would have diminished their gains.[3] But of the more purely legal objections to the state of the law I cannot speak fully till I have said something of the development of some of the other branches of the poor law.

Other branches of the Poor Law.

The statutes of Elizabeth [4] and Charles II,[5] and the many amending or consolidating statutes of the eighteenth century, had created many other branches of the poor law; and around many of them large bodies of case law had accumulated. Just as the settlement cases often involved a discussion of many

[1] Above 257-258. [2] Parlt. Hist. xviii 544.

[3] Speaking of the practice of summary removal by the overseer, with the result that a successful application to quarter sessions necessitated a second removal, and a quashing of the order of quarter sessions a third removal, the Webbs say, "the obvious remedy was to require the enquiry and any appeal to precede the actual removal. This was proposed to Parliament in a Bill of 1819, but was defeated—it is alleged, on good authority, because various members of the Bar in the House realised that such a reform would lessen the amount of the legal business at sessions," The Old Poor Law 332-333, and the General Report of the Poor Law Inquiry Commission 1834, there cited.

[4] 43 Elizabeth c. 2. [5] 13, 14 Charles II c. 12.

different branches of law; and just as the interpretation of the statutes relating to settlements and removals gave rise to considerable bodies of legal doctrine; so other branches of the poor law involved similar discussions and gave rise to similar bodies of legal doctrine. Let us glance rapidly at one or two illustrations.

Elizabeth's statute of 1601 made the parish the unit for the administration of the poor law and the assessment of rates.[1] Charles II's statute of 1662, recognizing the fact that certain parishes on account of their size could not "reap the benefit of" the Act of 1601, made the townships and villages within those parishes the units of poor relief and rate assessment.[2] These statutes gave rise to a considerable body of law on the questions, What is a parish? When could a vill or township be substituted for a parish? Could vills or townships in a parish, which had been separate units, agree to unite, or vice versa? On the first question it was settled that a place could make out a title to be a parish by usage and reputation.[3] On the other hand if a vill contributed to the repairs of the church of a certain parish, at which its marriages, burials, and christenings took place, the fact that the vill had once had a chapel, and had had till recently separate constables, and had made a separate rate, would not make it a separate parish.[4] On the second question it was held that, if there was a vill which was extra-parochial, so that there were no churchwardens or overseers to make a rate, with the result that the poor were not provided for, the court of King's Bench might, by virtue of the Act of 1662, order the justices of the peace of the county to appoint overseers for that vill.[5] On the other hand no such order could be made if the place in question was not a vill or a reputed vill.[6] On the question whether the place was a vill or a reputed vill the finding of the sessions could not be disputed.[7] On the third question, the test was, Could or could not the parish as a whole "reap the benefit of" the statute of Elizabeth? If it had been for some time administered as a whole, it must be proved that circumstances had so changed that it was necessary that its separate vills should be divided for the purpose of poor law administration;[8] and conversely, if its vills had been for some time divided, some reason

[1] 43 Elizabeth c. 2; vol. iv 156-157, 397.
[2] 13, 14 Charles II c. 12 § 21.
[3] Hilton v. Pawle (1628) Cro. Car. 92; Nichols v. Walker and Carter (1635) ibid 394.
[4] Rudd v. Foster (1693) 4 Mod. 157.
[5] R. v. Inhabitantes de Rufford (1722) 1 Stra. 512.
[6] R. v. Inhabitants of Welbeck (1728) 2 Stra. 1143; R. v. Showler and Atter (1763) 3 Burr. 1391.
[7] The King v. Inhabitants of Ronton Abbey (1788) 2 T.R. 207.
[8] Peart v. Westgarth (1765) 3 Burr. 1610.

must be shown for uniting them.[1] But the courts, after some hesitation,[2] eventually came to the sensible conclusion that changes of circumstances might necessitate new arrangements, and that they would uphold agreements of the different vills in a parish, in view of these circumstances, to unite [3] or divide themselves.[4]

The number and qualifications of the overseers prescribed by the statute of 1601 raised a number of disputed questions. There must be at least two and not more than four,[5] and they must be substantial householders resident in the parish ; [6] but the interpretation put upon the phrase "substantial householder" was elastic. In the case of *The King v. Stubbs* [7] it was said that it was a relative phrase, and that, if there were no other persons available, a day labourer was a sufficiently substantial householder.[8] On the other hand, both the cases and statutes supplied a long list of substantial householders who were not qualified to serve.[9] The statute of 1601 required churchwardens and overseers to account, within four days after the end of their year of office, for all monies received by them, and all rates assessed but not got in ; [10] and further provision for accounting was made by a statute of 1744.[11] There were also other statutes, under which money was levied, which made particular provisions for accounting for the money.[12] These statutes gave rise to a small body of case law.[13] The only point which need be noted here is the strictness of the rule that, since the office was one of the many unpaid offices which a person nominated must accept,[14] only the out-of-pocket expenses, incurred during a current year of office, were allowed to an overseer on the taking of his accounts.[15] Till 1801,[16]

if an overseer neglected to pay himself while he continued in office, he lost whatever he had advanced ; and even when he remained in

[1] The King v. Sir Watts Horton (1786) 1 T.R. 374 ; The King v. Inhabitants of Leigh (1790) 3 T.R. 746.

[2] In The King v. Inhabitants of Leigh (1790) 3 T.R. at pp. 747-748 Lord Kenyon C.J. said, "if the parish were properly divided at that time [the passing of the statute of 1662] nothing which has happened since will induce us to make any innovation" ; but Buller J. said at p. 749 that if it appeared that a parish could not now conveniently maintain its poor jointly, it would be allowed to divide itself ; and this view prevailed see The King v. Palmer (1807) 8 East at pp. 425-426 *per* Lord Ellenborough C.J.

[3] The King v. Palmer (1807) 8 East 416.

[4] The King v. Inhabitants of Walsall (1818) 2 B. and Ald. 157.

[5] Burn, Justice of the Peace (ed. 1820) iv 8.

[6] Ibid ; Case of the Overseers of Weobly (1747) 2 Stra. 1261.

[7] (1788) 2 T.R. 406 ; it was held in this case that a woman was a competent person, though it was said that "when there are a sufficient number of men qualified to serve the office, they are certainly more proper," ibid at p. 406.

[8] Ibid. [9] Burn, op. cit. iv 9-10. [10] 43 Elizabeth c. 2 § 2.

[11] 17 George II c. 38. [12] Burn, op. cit. iv 179-180.

[13] Ibid 185-196. [14] Above 153-154.

[15] Burn, op. cit. iv 183. [16] 41 George III c. 23 § 9.

office several successive years, he could not repay himself by a rate in one year what he had advanced in a year preceding, but was obliged to make up the account of each year, with reference only to that year's items. Still less could he or his executors claim any repayment from his successors even though the vestry consented.[1]

The legislation of the eighteenth century gave the overseers and justices power to give many different kinds of relief to different classes of persons. But, since the statute of 1601 had provided for setting the able-bodied to work, and for the relief of the impotent,[2] it was held that the justices had no power to order a payment of 3s. a week to a person so long as he continued poor, because it did not appear that he was also impotent.[3] Later statutes gave power to the justices to order relief under certain conditions;[4] but it was held that the sessions, though they might order the parish officers to give relief, could not order that the bills of persons who had supplied the relief should be paid.[5] Other statutes gave power to set up trades in order to give employment to the poor,[6] to build poor houses,[7] to purchase or lease houses and to contract for the maintenance of the poor therein,[8] to provide land for the employment of the poor.[9] Paupers who declined to go into the workhouse might be refused relief by the overseers, even though the sessions had ordered relief to be given;[10] and the application of this rule to the case of mothers, who applied for relief for their children, gave rise to litigation.[11] A statute of 1819[12] gave power to overseers to give relief on loan;[13] enacted that, if pensioners in the army or navy applied for relief, the overseers could require the pension to be assigned to them;[14] and that, if such pensioners deserted their wives and families and left them chargeable to the parish, the justices could order the pensions to be paid to the overseers.[15] It also gave the justices power to make orders on shipowners, to pay so much of a merchant seaman's wages to the overseers, as would reimburse them for the amount which they had spent in relieving the seaman's wife and family.[16]

A husband was liable at common law to maintain his wife;[17]

[1] Burn, op. cit. iv 184, citing The King v. Good-cheap (1795) 6 T.R. 159; cp. Tawny's Case (1704) 2 Salk. 531.

[2] 43 Elizabeth c. 2 § 1.

[3] R. v. Inhabitants of Hyworth (1717) 1 Stra. 10.

[4] Burn, op. cit. iv 129; above 174.

[5] Burn, op. cit. iv 130-131.

[6] 3 Charles I c. 5 § 22.

[7] 43 Elizabeth c. 2 § 5.

[8] 9 George I c. 7 § 4.

[9] 59 George III c. 12 § 12.

[10] Burn, op. cit. iv 139-140.

[11] Ibid 140-142; in The King v. Haigh (1790) 3 T.R. 637 it was held that an order of a justice that relief be given to a child must be obeyed, though the mother refused to go into the workhouse.

[12] 59 George III c. 12.

[13] § 29.

[14] § 30.

[15] § 31.

[16] § 32.

[17] Thompson v. Hervey (1768) 4 Burr. at p. 2178; cp. vol. iii 530.

and statutes of 1662 and 1719 provided a summary remedy against the property of husbands who deserted their wives and families, and left them chargeable to the parish.[1] The duty of maintaining poor relations was a duty which was, by statute, imposed on other persons besides husbands and fathers. Elizabeth's statute of 1601 provided that the father and grandfather, the mother and grandmother, and the children of a poor person should, if of sufficient ability, be liable to maintain such poor persons.[2] It was at one time thought that a husband could be made liable to maintain his mother-in-law and his step-children ;[3] and this rule was not wholly unreasonable at a time when the husband took all his wife's property on marriage. Some of the cases favoured the view that a step-father was liable to maintain his step-children during their mother's life only[4]—obviously by analogy to the extent of the husband's liability for his wife's torts. Holt, C.J., favoured a more extended liability. He said in the case of *Walton v. Sparks*[5] that " if a man married a grandmother with whom he hath any estate, and she dies, he must maintain the grandchildren, tho' the relation be determined." But all these controversies were settled in a series of cases, in which it was held that this liability to maintain extended only to blood relations, and therefore did not extend to relations-in-law or to step-children.[6] These decisions simplified the law ; but they created at least one anomaly which the earlier decisions avoided—if a widow with children and property made a second marriage, there might be no one liable to maintain the children. The step-father was not liable ; and the wife, since all her property went to her husband on marriage, was not of sufficient ability to maintain them, and was therefore not liable.[7] The dictum of Holt, C.J., in *Walton v. Sparks*[8] was sometimes taken to mean that in all cases the word " children " in Elizabeth's statute could be taken to include grandchildren, so that grandchildren were liable to maintain their grandparents[9]—though, as reported, the dictum hardly bears this extensive interpretation. Burn questioned the correctness of this interpretation ;[10] and it was eventually held that, as grandchildren were not expressly mentioned in Elizabeth's statute, they were not liable to maintain

[1] 13, 14 Charles II c. 12 § 19 ; 5 George I c. 8 ; 7 James I c. 4 § 8 provided that such persons should be punished as incorrigible rogues.

[2] 43 Elizabeth c. 2 § 7.

[3] See Draper v. Town of Glenfield (1632) 2 Bulstr. 345 ; and cases from Anne's reign cited by Burn, op. cit. iv 120.

[4] Ibid 120. [5] (1696) Comb. 320.

[6] R. v. Munden (1719) 1 Stra. 190 ; The King v. Benoier (1727) 2 Ld. Raym. 1454 ; R. v. Dempson (1732) 2 Stra. 955 ; Tubb v. Harrison (1790) 4 T.R. 118 ; Cooper v. Martin (1803) 4 East 76.

[7] Cooper v. Martin (1803) 4 East at p. 84 *per* Lawrence J.

[8] Above n. 5. [9] Burn, op. cit. iv. 122. [10] Ibid.

their grandparents.[1] Though the statute makes grandparents liable to maintain their grandchildren the converse liability is not imposed. The framers of the statute recognized, as Burn says,[2] that "natural affection descends more strongly than it ascends."

These are a few examples of the bodies of legal doctrine to which the legislation as to the relief of the poor gave rise. I must now say something of the character of this branch of local government law which the joint efforts of the Legislature and the courts had evolved.

The character of this branch of local government law.

Blackstone, after condemning the statutes relating to the poor as imperfect and inadequate, added that that was "the fate that has generally attended most of our statute laws, when they have not the foundation of the common law to build on."[3] There is an element of truth in Blackstone's diagnosis, though it is very far from being the whole truth. Statutes which introduce a wholly new idea into the law will always be imperfect and inadequate, partly because their framers cannot foresee the difficulties which will arise when their necessarily general provisions are applied to the infinite variations of fact arising in concrete cases, and partly because the courts must interpret these general provisions and apply them to these concrete cases, both in accordance with the general principles of the common law, and in accordance with the rules of interpretation which are recognised by the common law. These are defects which are inherent in a system of law which is developed partly by the Legislature and partly by the courts. They are as apparent in modern statutes as they are in these sixteenth-, seventeenth-, and eighteenth-century statutes which created the poor law, and as they are in many of the other bodies of statute law which created other branches of local government law. But this system of developing new bodies of law has two conspicuous merits. In the first place, it keeps the general principles laid down by Legislature in touch with the facts of life; and, in the second place, it keeps them in touch with the general principles of the legal system into which they have been introduced. Modern statutes like the earlier Companies Acts, and the earlier Workmen's Compensation Acts, which have introduced new ideas into the law, are necessarily imperfect; but the nature and character of their imperfections have been so clearly demonstrated by the application of their general principles to the facts of concrete cases, that these cases

[1] Maund v. Mason (1874) L.R. 9 Q.B. 254.
[2] Op. cit. iv 122. [3] Comm. i 365.

afford the best of all material for a new and improved Act. By a process of trial and error the new ideas which these statutes embody assume a practical form and become naturalized in the legal system.

The statutes which created the poor law, and the case law to which they gave rise, are not the most successful of the bodies of law which have been created by this process of trial and error. There are several reasons for this. First, they covered far more ground than any other body of local government law; for they touched all aspects of the life of the poor. Because they touched all aspects of the life of the poor, they were brought into contact with very many different branches of the common law. We have seen that some of the settlement cases involved a consideration of the law of seisin and disseisin,[1] of the law of marriage,[2] of the law of master and servant,[3] and of the law of apprenticeship.[4] The task of assimilating the provisions of the eighteenth- and nineteenth-century statutes to the principles of the common law on these and many other topics, naturally gave rise to a complex body of case law—a body of law which was the more complex because in the eighteenth and early nineteenth centuries, the doctrines of the common law, both substantive and adjective, were very rigid and very technical. Secondly, many of these statutes embodied divergent lines of policy. Ought able-bodied paupers to be forced to come into the workhouse?[5] Was a system of out-relief desirable, and if so on what conditions?[6] Was it possible to devise a scheme by which the pauper could earn enough by his work to make him self-supporting?[7] Was it better for the pauper that the units which administered relief should be large or small? On all these problems the statutes, and sometimes the cases,[8] spoke with an uncertain voice. Thirdly, the absence of efficient central control made the administration of the poor law ineffective. In particular, we have seen that the manner in which workhouses were administered, made it quite impossible to insist on a rigid workhouse test, and produced a system of out-relief which, in the later eighteenth and early nineteenth centuries, was demoralizing the poor and ruining the nation.[9] Fourthly, when, with the passing of the Poor Law

[1] Above 265. [2] Above 261. [3] Above 262-263.
[4] Above 263-264. [5] Above 174, 175-176. [6] Above 175-176.
[7] We have seen (above 257) that Blackstone, like the framers of the statute of 1601, and many other writers, believed that this was possible, see Lipson Economic History iii 469-471.
[8] For instance the judges differed on the question whether large or small units of administration were the more desirable; in Peart v. Westgarth (1765) 3 Burr. at pp. 1614, 1615 Lord Mansfield C.J. and Wilmot J. thought that large units were desirable; in The King v. Inhabitants of Leigh (1790) 3 T.R. at pp. 748, 749 Lord Kenyon C.J. and Buller J. thought that small units were desirable.
[9] Above 175-176.

Act of 1834,[1] efficient control came, the law was already complex. Efficient control and efficient administration did little to amend the complexities of the law.[2] In fact it was made more complex by amending Acts and departmental orders. The authors of the article on the Poor Law in Halsbury's *Laws of England*, which was written in 1912, justly said that no branch of English law more needed to be codified.[3] This measure of codification has been supplied in these last years. The Act of 1927 which consolidated the Poor Law,[4] the Local Government Act of 1929 which revolutionized the machinery by which it is administered,[5] and the Poor Law Act of 1930,[6] have done much to simplify and rationalize the law.

But though the eighteenth-century poor law had many defects, it also had, at least from a technical point of view, some merits. The courts did succeed in producing, from a large number of very divergent and not very well-drafted statutes, a coherent, if not always a simple or a rational, body of doctrine; and some of the principles which they evolved still live in the Poor Law Act of 1930. We shall now see that what the eighteenth-century decisions did for the poor law, they were also doing, with rather more success for other bodies of local government law.

II. *Rating.*

What is a rate and how does it differ from a tax? The real difference, as Cannan has pointed out,[7] centres round the manner in which an authority, which is proposing to raise money, proceeds to raise it.

> In the case of a tax, the taxing authority decides that individuals shall make particular payments on particular occasions, and the aggregate sum it receives depends on how much these payments add up to. In the case of a rate, the taxing authority decides how much money it wants in the aggregate, and this amount is raised by apportioning the payment of it between the various ratepayers in accordance with some

[1] 4, 5 William III c. 76.

[2] It was the view of John Revans, the secretary to the royal commission on the poor law (1832-1834), that, though the Act of 1834 had met the evil of maladministration, it had not attacked the root of the evil—the law of settlement, Webb, the Old Poor Law 348-349.

[3] "It [the poor law] originated in 1601 with the enactment which is still the keynote of the system, but the comparatively simple origin is almost lost in a maze of statutes, departmental orders, and directions, which have in practice the force of statutory enactments, and judicial decisions and *obiter dicta*, many of them absolutely irreconcilable the one with the other. . . . No branch of the laws of England stands in greater need of codification," Halsbury, Laws of England (1st ed.) xxii 523.

[4] 17, 18 George V c. 14.

[5] 19 George V c. 17 Part I.

[6] 20 George V c. 17.

[7] History of Local Rates (2nd ed.) 4-5.

definite standard made for the occasion or already in existence. Thus in the case of a tax the procedure is by way of addition, and in the case of a rate by way of division.

In fact, from 1334 onwards, the fifteenths and tenths imposed by Parliament were levied as rates.[1]

We have seen that it was through the machinery of the parish that rates were collected ;[2] and that, when, by a statute of 1739,[3] the separate rates authorized by many statutes of the sixteenth, seventeenth, and eighteenth centuries were consolidated into one general rate, and provision was made for its more easy assessment and collection, the poor rate was made the foundation of this general rate.[4] The sums assessed for this general rate were made payable out of the poor rate.[5] It is therefore around the poor rate that, in the eighteenth century, the principles of a law as to rates and rating began to emerge.[6] The cases show that a body of law was beginning to grow up upon such topics as, the making of a rate and the purposes for which it could be made ; the persons on whom a rate could be assessed and the property on which it could be assessed ; the basis of assessment ; the nature of the liability to pay rates ; the position of the Crown. I shall at this point deal very briefly with the beginnings of some of the rules of law which the courts were creating upon these five topics.

The making of a rate and the purposes for which it could be made.

The statute of 1601 provided that the rate should be made by the churchwardens and overseers, with the consent of two or more justices of the county dwelling in or near the parish.[7] The concurrence of the inhabitants was not required.[8] The rate must be made for the relief of the poor, or to meet the demands made by the county authorities under the statute of 1739.[9] Thus it could not be made to reimburse an overseer for money which he had advanced for the relief of the poor. Holt, C.J., said, " It is not material indeed, whether the money be disbursed before, or after a rate made ; but then you must raise money by a rate for the relief of the poor, and not to reimburse yourself. The overseers cannot charge the parish with what sums they please."[10] On the other hand it was held that, though

[1] History of Local Rates (2nd ed.) 13.
[2] Above 169.
[3] 12 George II c. 29.
[4] Above 170.
[5] 12 George II c. 29 § 2.
[6] It is for this reason that what Burn, in his Justice of the Peace, has to say about rating is grouped round the poor rate, and contained in the title " Poor."
[7] 43 Elizabeth c. 2 § 1.
[8] Burn, Justice of the Peace (ed. 1820) iv 34.
[9] 12 George II c. 29.
[10] Tawney's Case (1704) 2 Ld. Raym. at p. 1012.

no statute authorized a county to pay out of the rates the expenses of litigation, such payment was sanctioned by precedent usage and necessity. "Wherever," said Lord Kenyon, C.J.,[1] "a duty is imposed on a county, and where costs incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates, who have the superintendence over the county purse, have necessarily a right to defray such expenses out of the county stock."

Overseers were given power by the Legislature to levy rates in order to defray the cost of maintaining the poor, and to provide funds to meet the other purposes for which rates could be made under the statute of 1739.[2] It followed therefore that the Legislature gave no sanction for the levy of a permanent rate. Rates could only be levied by the overseers from time to time, as and when it was necessary to meet the expenses which they were allowed by law to incur. In the case of *R. v. Inhabitants of Audley* [3] it appeared that a rate had been fixed and agreed to in 1665, which had been levied ever since till 1700. In that year a new rate had been made which had been quashed by quarter sessions. The order of quarter sessions quashing the new rate was quashed by the court of King's Bench. Holt, C.J., said that the justices could not make "a standing rate," because "lands may be improved"; and that, as by statute "the rate must be equal, *ergo* it ought to be continually altered as circumstances alter." [4] It followed also that, though a rate could be made to meet the expenses incurred by overseers during their year of office, a rate could not be made to reimburse the expenses of ex-overseers; [5] and still less could it be made to reimburse either present or past overseers for money which they had borrowed to meet their expenses.[6] On the other hand it was held that a prospective rate for a period of six months was good. "A rate," it was said, "may be made prospectively, not indeed wantonly, but such as is adapted to the probable exigencies of the parish." [7] Though a little authority was cited against this proposition,[8] the power to make a prospective rate was obviously given to the overseers by the statute of Elizabeth.[9]

[1] The King v. Inhabitants of Essex (1792) 4 T.R. at p. 594.
[2] 12 George II c. 29. [3] (1701) 2 Salk. 526. [4] Ibid.
[5] Tawney's Case (1704) 2 Ld. Raym. 1009.
[6] R. v. Wavell (1779) 1 Dougl. 115.
[7] Durrant v. Boys and Burgis (1796) 6 T.R. at p. 581 *per* Lord Kenyon C.J.
[8] Tracy v. Talbot (1705) 2 Salk 532, where Holt C.J. said that assessments ought to be made monthly; The Churchwardens of Bishopgate v. Beacher (1721) 8 Mod. 10, where the court seemed to think that a rate could not be made for a whole year, but should have been made only for a quarter.
[9] Durrant v. Boys and Burgis (1796) 6 T.R. at p. 582 *per* Grose J.

The persons on whom a rate could be assessed, and the property on which it could be assessed.

The basis upon which the law on these two allied topics has been built up is a sentence in section 1 of the statute of 1601,[1] which runs as follows:

> And also to raise weekly or otherwise by taxation of every inhabitant, parson, vicar and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods in the said parish, in such competent sum and sums of money as they [the overseers] shall think fit.

On the slender basis of this sentence a large superstruction of case law was erected in the eighteenth century; and, though it has been added to and altered by modern statutes, this body of case law is still, to a large extent, the basis on which the modern law rests. But, though the bulk of the modern law is large, neither the Legislature nor the courts have defined completely the persons on whom a rate can be assessed or the property on which it can be assessed. The authors of the article on Rates and Rating in Lord Halsbury's *Laws of England* said in 1912 that the conception of rateable occupation, which is the main basis of liability to pay poor and other rates, was not defined by statute, nor has it been "exhaustively defined" by judicial decision;[2] and Burn said in his *Justice of the Peace* that the court of King's Bench had always "been averse from delivering any opinion upon the general question how far personal estate is to be rated to the poor, but have determined the several cases upon their own particular circumstances."[3] And so at the present day the law upon both these matters must be spelt out of a large number of statutes and cases which cover a period of some three centuries.

I shall at this point consider very briefly, first, the origins of the law as to the persons on whom a rate can be assessed, i.e. the conception of rateable occupation; and, secondly, the origins of the law as to the property on which the rate can be assessed.

[1] 43 Elizabeth c. 2; as Cannan has pointed out, the framers of the statute of 1601 were probably influenced by the existing practice in the matter of rating, History of Local Rates 21; the general idea that each person should pay according to his ability leads, in an agricultural community, to taking a person's farm and flocks as the guide to his ability to pay, and in an urban community, to taking the value of the house he occupies; thus arises the idea that it is not so much the person who is rated as a particular kind of property which he occupies, and occupation, whether or not accompanied by residence, comes to be the test of rateable capacity, ibid 23-24.

[2] "Rateable occupation is the chief ground of liability to the poor rate. It is not defined by statute, nor has it been exhaustively defined by judicial decision," (1st ed.) vol. xxiv 4.

[3] (Ed. 1820) Title "Poor" iv 51-52; for this topic see below 284-287

(i) *Rateable occupation.*—Before 1601 the courts had held that a person could be assessed to a rate by the overseers of the parish of X, in respect of lands which he occupied in that parish, though he was resident in the parish of Y.[1] But if, instead of occupying the lands in the parish of X, he had let them to a farmer, the occupying farmer would have been assessable;[2] for it was settled as early as 1633 that rates are assessable not on owners as such, but upon occupiers.[3] The rate, it is said, "is not a charge upon land, but upon the occupier in respect of his land."[4] In this respect, as Lord Mansfield pointed out,[5] the land tax differed from the poor rate. "The landlord who receives the rent is to pay the land-tax: but the poor's tax is payable by the occupiers." It follows therefore that if no occupier at all can be found the place cannot be rated, and, as Lord Mansfield said, "there can be no rate at all."[6] What then were the qualities of rateable occupation? The most important element in the conception of rateable occupation is possession. Has an occupier such possession that, in respect of the infringement of it, he could maintain an action of trespass?[7] If so he is rateable, though he possesses in common with others,[8] and though he himself may be a trespasser[9] or a disseisor.[10] But this possession, if it is to be the basis of rateable occupation, must also have other characteristics:

First, the possession must not be merely transitory. As early as 1603 it was said that if a man took a lodging for a week in a

[1] Jeffrey's Case (1590) 5 Co. Rep. at f. 67*b*; Burn, op. cit. iv 38; Cannan, op. cit. 24-26.

[2] Ibid.

[3] "The Judges [Hutton and Croke JJ.] did both of them agree in this, that by the law the occupiers of the land are only to be charged, and this in regard of their possessions, and not the lessor, in regard of the rents which he received," Sir Anthony Earby's Case (1633) 2 Bulstr. 354.

[4] Burn, op. cit. iv 40.

[5] R. v. Occupiers of St. Luke's Hospital (1760) 2 Burr. at p. 1063.

[6] Ibid at p. 1065; Lord Mansfield, disagreeing with a dictum of Holt C.J. (Anon. (1702) 2 Salk. 527) that no man can, by appropriating his lands to a hospital, exempt them from taxes to which they were subject before, pointed out in this case at p. 1064, that the question whether a property is rateable, and the amount at which it can be rated, depend largely on the use which the owner makes of it —"for this rate payable to the parish, as well as several other payments arising from property and chargeable upon it, do and must depend upon the will of the proprietor. The owner of a house may, if he pleases, pull it quite down, and convert it into a toft. The owner of lands may, if he pleases, suffer them to be barren and unoccupied."

[7] It was held in The King v. Watson (1804) 5 East 480 that burgesses allowed by the corporation of Huntingdon to stock land belonging to the corporation, were tenants in common occupying the land, and were liable to be rated, for each of them could, as Lord Ellenborough C.J. said at p. 486, "maintain trespass for an injury done to his occupation in common."

[8] Ibid.

[9] Forrest v. Overseers of Greenwich (1858) 8 E. and B. at p. 897 *per* Lord Campbell C.J.

[10] "If a disseisor obtains possession of land, he is rateable as the occupier of it," The King v. Bell (1798) 7 T.R. at p. 601 *per* Lord Kenyon C.J.

town he was not rateable ;[1] and this is good modern law.[2] But a house may be rateably occupied, though the tenant is out of possession, if there is an intention to return, and the house is kept in a condition which permits such return at any time.[3] If the occupation is not merely transitory, it is no objection that the tenant is merely a tenant at will ;[4] so that it has been held that the occupiers of an alms-house,[5] the officers of a hospital in respect of the rooms allotted to them,[6] a schoolmaster occupying a house as part of his remuneration,[7] and persons occupying apartments in a royal palace by permission of the Crown [8]—are all rateable occupiers. On the other hand a person who occupies a room in a house merely as an incident to his or her contract of service, is not a rateable occupier.[9] His or her occupation may be very transitory,[10] it is a benefit not so much to himself as his employer,[11] and it is not exclusive.[12] Secondly, the possession must be actually or potentially profitable. In the case of *R. v. The Occupiers of St. Luke's Hospital*[13] the lessees of the property who held it on trust were not liable to be rated, because they could make no profit from it. "They are merely nominal," said Lord Mansfield, "mere instruments of conveyance ; and have no more interest in the thing than the crier of the Court of Common Pleas has when he is named as the last vouchee in a common recovery."[14] On this principle trustees of a chapel who make no profit from the use of the building have no rateable

[1] Holledge's Case, Burn, op. cit. iv 41.

[2] Cory v. Bristow (1877) 2 A.C. at pp. 275-276.

[3] The King v. Inhabitants of St. Mary the Less (1791) 4 T.R. 477 ; R. v. Inhabitants of Aberystwith (1808) 10 East 354.

[4] "It is perfectly immaterial what interest the occupier has in the lands ; whether he holds as tenant at will, or by any other tenure," Lord Bute v. Grindall (1786) 1 T.R. at p. 343 *per* Buller J.

[5] R. v. Munday (1801) 1 East 584.

[6] Ayn v. Smallpiece (1751) Burn, op. cit. iv 42—the comptroller of Chelsea hospital.

[7] R. v. Catt (1795) 6 T.R. 332.

[8] R. v. Ponsonby (1842) 3 Q.B. 14 ; cp. Lord Bute v. Grindall (1786) 1 T.R. 338, affirmed on a writ of error 2 Hy. Bl. 265.

[9] R. v. Occupiers of St. Luke's Hospital (1760) 2 Burr. at p. 1064 ; R. v. Inhabitants of St. Bartholomew's the Less (1769) 4 Burr. at p. 2439 ; The King v. Field (1794) 5 T.R. 588.

[10] See the facts in The King v. Field (1794) 5 T.R. 588.

[11] See The King v. Munday (1801) 1 East at p. 597 *per* Le Blanc J.

[12] Below 282.

[13] (1760) 2 Burr. 1053.

[14] Ibid. at p. 1064 ; Blackburn J. pointed out in the case of Mersey Docks v. Cameron (1864-1865) 11 H.L.C. at p. 466 that this is true if Lord Mansfield meant to say that bare trustees, who are not occupiers, are not rateable ; but that it is not true to say that persons who are occupiers are not rateable, because they occupy in a fiduciary character ; much confusion has been caused by the fact that the courts sometimes supposed that whenever property was occupied by persons who held it on a public trust those persons were not rateable, below 298 ; Lord Kenyon put this interpretation on Lord Mansfield's words, see 11 H.L.C. at p. 468, and so did Lord Ellenborough, below 298.

occupation ; [1] but they have a rateable occupation if they make a profit by letting pews or otherwise ; [2] and a corporation seised of lands for its own profit is rateable as an occupier.[3] The fact that the occupier abstains from taking a profit, which he might have made, will not prevent his occupation being profitable,[4] any more than the fact that he is sometimes absent, or that premises are sometimes vacant, will prevent them from being occupied, if he intends to return.[5] Thirdly, the possession must be exclusive. We have seen that tenants in common have exclusive possession of that which they hold in common, and are therefore in rateable occupation.[6] But

> when a person already in possession has given to another possession of a part of his premises, if that possession be not exclusive, he does not cease to be liable to the rate, nor does the other become so. A familiar illustration of this occurs in the case of a landlord and his lodger. Both are, in a sense in occupation, but the occupation of the landlord is paramount, that of the lodger subordinate.[7]

It would seem that the fact that a servant is not rateable in respect of the apartment which he or she occupies can be justified upon this ground, as well as upon the ground that his or her occupation is not permanent or beneficial.[8]

Though the rateable occupier is, as a general rule, liable to pay rates, there are some exceptions to this rule. First, owners not in occupation are in some cases liable, thus parsons, vicars, and lay or spiritual impropriators are liable in respect of tithes received by them, or in respect of any rent or rent charge substituted for tithes ; [9] and statutes have, in some cases, transferred liability from the occupier to the owner.[10] Secondly, there have always been exceptions from liability to be rated in favour of persons or bodies of persons. At common law a person who was liable to repair a highway *ratione tenurae* [11] was exempt from highway rates, and therefore from such part of a poor rate as was levied to meet highway expenses ; [12] local Acts sometimes gave exemption in the eighteenth century ; [13] and in the nine-

[1] The King v. Woodward (1792) 5 T.R. 79.
[2] The King v. Agar (1810) 14 East 256.
[3] R. v. Gardner (1774) 1 Cowp. 79.
[4] Winstanley v. North Manchester Overseers [1910] A.C. at p. 15.
[5] Above 281. [6] Above 280 n. 7.
[7] Holywell Union and Halkyn Parish v. Halkyn Drainage Co. [1895] A.C. at p. 126 *per* Lord Herschell L.C. ; cp. Cory v. Bristow (1877) 2 A.C. at p. 276.
[8] Above 281.
[9] 43 Elizabeth c. 2 § 1 ; Halsbury, Laws of England (1st ed.) xxiv 17-18.
[10] Ibid 19-21 ; the earliest of these statutes seems to be 59 George III c. 12 § 19.
[11] For this liability see below 311-312.
[12] Halsbury, op. cit. (1st ed.) xxiv 24.
[13] For instance houses built on land embanked from the Thames were exempted from liability to rates by 7 George III c. 37 ; see Williams v. Pritchard (1790) 4 T.R. 2 ; Eddington v. Borman (1790) ibid 4.

teenth century exemptions are given both by local and general Acts.[1]

Subject, however, to these modifications, which do not cover very much ground, it is rateable occupation which is the basis of liability to pay rates. But it is clear that, as new inventions are made, and as new social conditions emerge, new modes of enjoying property will be introduced. Therefore new questions will arise as to whether, in those new circumstances, new instances of rateable occupation have or have not arisen. It is for this reason that the conception of rateable occupation can never be exhaustively defined. All this will be apparent when we have considered the intimately related question of the property on which rates can be assessed.

(ii) *The property assessable.*—Some of the principles which govern the conception of rateable occupation exclude certain kinds of property from liability to be assessed to rates. Thus there can be no rateable occupation of a mere easement, so that an exclusive way-leave granted by A to B is not property upon which B can be rated.[2] But it is otherwise if the grant of a way-leave is accompanied by the grant of a right to erect buildings on the land, and do other acts which connote possession, and therefore rateable occupation.[3] Similarly a right of common, being a merely incorporeal right, is not, as such, rateable;[4] but a right of common, if it gives a right to the exclusive occupation of the land, is rateable.[5] On the same principle the right to take a toll is not *per se* rateable.[6] It is an incorporeal right, and it does not come under any of the species of property mentioned in the statute of 1601[7]—so that the owner of the tolls of a ferry, who was not resident in the parish where the toll was collected, was not rateable in respect of them.[8] But property, such as a lock or canal works, which yields a profit by means of the tolls is rateable.[9] A toll thorough, being unconnected with any occupancy of the land, is not rateable; but a toll traverse is rateable, if the person entitled to the toll is in occupation of the land over

[1] Halsbury, op. cit. (1st ed.) xxiv 21-23.

[2] The King v. Jolliffe (1787) 2 T.R. 90; Grose J. at p. 95 pointed out that the occupier of the land must be rated, and that, if the easement were also rated, the same thing would be rated twice over; but the real reason is the fact that there can be no such possession of a mere easement as is necessary for rateable occupation.

[3] The King v. Bell (1798) 7 T.R. 598.

[4] Kempe v. Spence (1779) 2 W.Bl. 1244—"the common itself, *qua* common, was certainly not rateable, not being the subject of occupation."

[5] The King v. Inhabitants of Aberavon (1804) 5 East 453.

[6] The King v. Nicholson (1810) 12 East 330.

[7] Ibid at p. 342. [8] Ibid at p. 343.

[9] R. v. Inhabitants of Cardington (1777) 2 Cowp. 581; The King v. Staffordshire and Worcestershire Canal (1799) 8 T.R. 340.

which a person is allowed to pass in consideration of paying the toll.[1]

The statute of 1601 made it clear that some sorts of property were rateable.[2] Tithes were clearly rateable, and so were coal mines and saleable underwoods. Other mines were not rateable.[3] On the other hand, the lessee of land, to whom was given the privilege of digging mines in the land, was rateable in respect of his occupancy of the land ; [4] and it was held that a Crown lessee of a mine, who was entitled to receive from the miners a certain proportion of the produce, was rateable in respect of that produce.[5] But we shall see that rent, as such, was not rateable ; [6] so that, though the landlord who received part of the produce of a mine was rateable in respect of it, because he could be regarded as being in rateable occupation of a portion of the land, he was not rateable in respect of a rent payable for the mine.[7] Cases which arose at the end of the eighteenth and the beginning of the nineteenth centuries, as to the rateability of the undertakings of water companies,[8] canal companies,[9] and dock companies,[10] show that the industrial revolution was beginning to raise a large number of new problems in rating law. But there was one problem which had been raised in the seventeenth and eighteenth centuries, and had been settled in the eighteenth century by a compromise which was not wholly logical. This was the problem of the liability of personal property to be rated.[11]

In 1633, in *Sir Anthony Earby's Case*,[12] Haughton, Hutton and Croke, JJ., laid down the principle that only occupiers of the land could be charged, and that inhabitants were to be assessed according to their " visible estates real and personal." [13]

[1] The King v. Snowdon (1833) 4 B. and Ad. 713 at pp. 716-717 ; for the distinction between tolls traverse and tolls thorough see below 308.

[2] 43 Elizabeth c. 2.

[3] Governor and Company for Smelting Lead v. Richardson (1762) 3 Burr. 1341 ; cp. Rowls v. Gells (1776) 2 Cowp. at p. 453 ; the law on this matter was not changed till 1874, 37, 38 Victoria c. 54 §§ 3 and 7 ; cp. Cannan, History of Local Rates 101.

[4] The King v. Parrot (1794) 5 T.R. 593.

[5] Rowls v. Gells (1776) 2 Cowp. 451. [6] Ibid at p. 453 ; below 286-287.

[7] The King v. Bishop of Rochester (1810) 12 East 353 ; Le Blanc J. said at p. 359, " if the trustees (i.e. the landlord) were rateable at all, it must be as occupiers of the mines or some proportion of them : but here they were rated as for a rent *eo nomine*, for which, if they were rateable, every landlord might by the same rule be rated for his rent."

[8] R. v. Rochdale Waterwork Co. (1813) Burn, op. cit. iv 75-76.

[9] The King v. Macdonald (1810) 12 East 324.

[10] The King v. Dock Co. of Hull (1786) 1 T.R. 219.

[11] For the history of this topic see Cannan, History of Local Rates 87-100.

[12] 2 Bulstr. 354.

[13] " Hereupon it was held, and so delivered for law, by Haughton and Croke, Justices of Assize, that such assessments ought to be made according to the visible estate of the inhabitants there, both real and personal, and that no inhabitant there is to be taxed by them to contribute to the relief of the poor, in regard of any

That case is therefore an authority for the proposition that local and visible personal estate is liable to be assessed for rates. In 1699 the King's Bench ordered the overseers to rate both real and personal property;[1] and in 1706 the judges of the court of King's Bench, Holt, C.J. dissenting, were of opinion that, though a farmer's stock was not liable to be assessed to poor rate, a tradesman's stock was liable.[2] Possibly the reason was that a farmer's stock was regarded as annexed to the land, so that it had already been assessed with the land to which it was annexed; but that a tradesman's stock was not thus annexed to the land, and must therefore be separately assessed. But in 1775 this ruling as to the rateability of a tradesman's stock was treated by Lord Mansfield, who seems to have been very opposed to the idea that personal property was rateable, as a mere dictum;[3] he expressed a strong opinion that no personal property was rateable; and ridiculed the distinction between visible personal property and personal property which was not visible.[4] But two years later,[5] after hearing an elaborate historical argument by Burrough in favour of the proposition that all personal property, and therefore a tradesman's stock, was rateable,[6] he reconsidered his former opinion as to the baselessness of the distinction between visible personal property and property which was not visible, and suggested a distinction which later cases have sanctioned. He said:[7]

It is a very different question, whether personal estate is to be rated to the extent in which it has been argued to-day, or not to be rated at all in any shape, or under any circumstances. It would make the poor laws very oppressive, if a man is to be taxed to the extent of his whole personal estate and income. In that case, every man who has money in the funds, would be liable: lawyers for their fees; soldiers for their pay, etc. But where men are occupiers of houses, and have stock in trade, whether such stock in trade may be taken into consideration is a very different question. Some personal estate may be rateable: but it must be local visible property within the parish. The general

estate he hath elsewhere, in any other town or place, but only in regard of the visible estate he hath in the town where he doth dwell, and not for any other land which he hath in any other place or town. And also by Hutton and Croke, Justices of Assize, this hath been so resolved by all the Judges of England, upon a reference made to them, and upon conference by them had together," 2 Bulstr. 354.

[1] Case of the Parish of St. Leonard Shoreditch 2 Salk. 483.

[2] The Queen v. Inhabitants of Barking 2 Ld. Raym. 1280.

[3] R. v. Inhabitants of Ringwood 1 Cowp. at p. 329.

[4] "They talk of visible property; what is visible property? I confess I do not know what is meant by visible property. If every visible thing should be determined to come under that description, in that case a lease for years, a watch in a man's pocket would be rateable. Visible property is something local in the place where a man inhabits. But that does not decide what a man's personal property is. Consider how many tradesmen depend upon ostensible property only," ibid at pp. 328-329.

[5] R. v. Churchwardens of Andover (1777) 2 Cowp. 550.

[6] Ibid at pp. 551-564.

[7] Ibid at pp. 564-565.

question is too extravagant. It would be material to state what has been the custom of rating. If the usage should be to take in stock-in-trade, there would be very good right to support it.

Lord Mansfield's suggestion that the question whether stock-in-trade was rateable should be governed by usage was really an impossible suggestion. Obviously usages might differ in different places. The suggestion was repudiated by Aston, J., in this case ;[1] and, though it was again made by Lord Mansfield, and then apparently approved by Aston, J.,[2] it was expressly repudiated by Grose, J., in the case of *The King v. Hogg*.[3] But the distinction which Lord Mansfield drew between local and visible personal property and other personal property—a distinction which is ultimately traceable to *Sir Anthony Earby's Case* in 1633[4]—has been made the test of what personal property is rateable and what is not. It was held in the case of *The King v. White*[5] that ships and stock-in-trade were rateable, but not household furniture, money whether lent at interest or not, the pay of naval officers, or salaries[6] of officers of the customs or of merchant's clerks ; and in the case of *The King v. Inhabitants of Darlington*[7] it was again held that stock-in-trade was rateable. Those cases were treated as decisive in the case of *The King v. Inhabitants of Ambleside ;*[8] and this case in effect overruled Lord Mansfield's suggestion that a consideration of what the usage had been might affect the question of rateability.[9] In other cases it was held that neither the quit rents and casual profits of a manor,[10] nor rent,[11] nor money invested in government stock,[12] nor profits of a trade or profession,[13] were rateable.

But though the courts had held that stock-in-trade was rateable, it was not in fact rated ;[14] and the Parochial Assessments Act 1836,[15] though it " prescribed elaborate forms for the assessment of lands, preserved absolute silence as to stock-in-trade." [16] But in 1839 the court of Queen's Bench decided in the case of *The Queen v. Lumsdaine*[17] that the Act of 1836 had not put an end to the " known and long-established practice of rating

[1] R. v. Churchwardens of Andover (1777) 2 Cowp. at p. 565.
[2] R. v. Hill (1777) 2 Cowp. at pp. 618-619.
[3] " As to usage, I am clearly of opinion that it ought not to be attended to in construing an Act of Parliament which cannot admit of different interpretations " (1787) 1 T.R. at p. 728 ; below n. 9.
[4] Above 284. [5] (1792) 4 T.R. 771.
[6] See R. v. Inhabitants of Shalfleet (1767) 4 Burr. 2011.
[7] (1795) 6 T.R. 468. [8] (1812) 16 East 380. [9] See ibid at p. 381.
[10] R. v. Vandewall (1760) 2 Burr. 991 ; some older cases seem to point to a contrary conclusion, see Hull's Case (1688) Carth. 14 ; Anon. (1695) Comb. 264.
[11] Rowls v. Gells (1776) 2 Cowp. at p. 453 ; above 284.
[12] The King v. Churchwardens of the Parish of St. John Maddermarket (1805) 6 East 182.
[13] The King v. Startifant (1796) 7 T.R. 90.
[14] Cannan, History of Local Rates 97. [15] 6, 7 William IV c. 96.
[16] Cannan, op. cit. 97. [17] 10 Ad. and E. 157.

personal property in many cases." [1] The result was the passing of an Act which declared that an inhabitant was not to be rated "in respect of his ability derived from the profits of stock-in-trade or any other property." [2]

It is, as Burn said, difficult to extract the principle underlying the distinction drawn between different kinds of personal property. In the case of rent non-rateability was based on the principle that rent issued out of the land, and that, as the occupier of the land had been rated, to rate the rent would amount to a double rate on the same property.[3] In the case of money, and such chattels as household furniture, exemption was based on the ground that it produced no profit.[4] In the case of salaries, interest, and the profits of a trade, it was based partly on the fact that they were not mentioned in the statute of 1601,[5] partly on the fact that to allow such property to be assessed would make the poor law too oppressive,[6] partly on the fact that these kinds of property were not visible property,[7] partly on the fact that they were not necessarily locally situate in the parish, and partly on the difficulty in assessing them.[8] It would seem, therefore, that the distinction is based partly on deductions drawn from the conception of rateable occupation, partly on the interpretation of the statute of 1601, and partly on considerations of convenience and public policy. We shall now see that it was also in part due to absence of any clear direction in the Act of 1601 and later Acts or to the basis of assessment.

The basis of assessment.

The Act of 1601 directed the overseers to make a rate with the consent of two justices of the peace ; [9] and it gave to persons who were aggrieved by the assessment of a rate a right to appeal to quarter sessions,[10]—a right which was enlarged by a statute of

[1] At p. 160 *per* Lord Denman C.J.

[2] 3, 4 Victoria c. 89 ; Cannan, op. cit. 99-100.

[3] Sir Anthony Earby's Case (1633) 2 Bulstr. 354; "the landlord is never assessed for his rent, because that would be a double assessment, as his lessee has paid before," Rowls v. Gells (1776) 2 Cowp. at p. 453 *per* Lord Mansfield C.J. ; cp. Cannan, History of Local Rates 82-85.

[4] The King v. White (1792) 4 T.R. at p. 776 *per* Buller J.

[5] Ibid at p. 777 *per* Grose J. ; R. v. Inhabitants of Shalfleet (1767) 4 Burr. at p. 2014 *per* Lord Mansfield C.J.

[6] R. v. Churchwardens of Andover (1777) 2 Cowp. at p. 565 *per* Lord Mansfield C.J. cited above 285-286.

[7] Ibid.

[8] "A man's personal estate is only that which he is worth after payment of all his debts: which cannot easily appear, so as to be rated. . . . We are all of opinion that this (a salary) is not such a species of property as can be rated to the relief of the poor, as personal estate within the parish," R. v. Inhabitants of Shalfleet (1767) 4 Burr. at p. 2015 *per* Lord Mansfield C.J.

[9] 43 Elizabeth c. 2 § 1. [10] § 6.

1744.[1] We have seen that the Act gave some directions as to the property which,[2] and the persons who,[3] could be assessed. But it gave no direction as to the manner in which the property was to be assessed. All that is said is that the amount must be raised "according to the ability of the parish."[4] But, as Cannan has pointed out,[5] the principle of assessing a person according to his ability to pay, is not easily reconciled with the principle that a non-resident occupier must be assessed.[6] If X, resident in the parish of A and occupying land in the parish of B, is assessed in parishes A and B, he cannot be assessed in A according to his total ability to pay, because in respect of part of that ability he is already assessed in the parish of B. X will therefore be assessed in the parish of A on the basis of the property he possesses in A—in other words on the basis of the property which he obviously occupies there. There will thus be a tendency to adopt in all cases the standard applied to non-resident occupiers, and to assess simply on the value of the "local and visible" estate;[7] and not on the wider and vaguer principle of ability to pay. The adoption of the former test, and its implications were, in the absence of any directions by the Legislature, gradually worked out by the courts;[8] and, as we have seen, finally triumphed in 1840.[9] Though later statutes have laid down special rules in certain cases,[10] it is the rules, which the courts worked out in the eighteenth and nineteenth centuries, which are the basis of the modern law.

The courts of common law were not directly concerned with the question of the basis of assessment. In 1746 the court of

[1] 17 George II c. 38 § 4; *inter alia* it gave a person a right to appeal if he was aggrieved by the fact that any person was put in or left out of the assessment; further rules as to appeals were made by 41 George III c. 23.

[2] Above 284. [3] Above 280-283.

[4] 43 Elizabeth c. 2 § 1; if the inhabitants of the parish were not able to raise the money, other parishes within the hundred or the hundred might be assessed, § 3.

[5] History of Local Rates 76-77; cp. ibid chap. ii for an account of some miscellaneous statutory rates, the basis of assessment to which was sometimes ability to pay, and sometimes the benefit derived by the ratepayer, ibid at p. 50.

[6] Jeffrey's Case (1590) 5 Co. Rep. at f. 67*b*; above 280.

[7] Sir Anthony Earby's Case (1633) 2 Bulstr. 354; above 284-285.

[8] See Cannan, op. cit. 78-79; for some instances of the survival of the ability test, see Anon. (1699) Comb. 478, where the court said "that the rent is no standing rule, for circumstances may differ, and there ought to be regard ad statum et facultates"; and Nightingale v. Marshall (1823) 2 B. and C. 313, where it was said to be a special custom in the parish of St. Mary Whitechapel to assess, not "according to an equal pound rate," but "according to the ability of the party charged, such ability being estimated with reference to property, whether in the parish or out of it"; both these cases are cited by Cannan.

[9] Above 287.

[10] 6, 7 William IV c. 96 § 1, which provided that rates were to be assessed on the net annual value as defined by the section, below 292; 25, 26 Victoria c. 103 § 15, which defined the phrase gross estimated rental; 37, 38 Victoria c. 54, which laid down rules for rating certain kinds of property specified in the Act.

King's Bench refused to grant a mandamus directing that certain persons should be assessed to the poor rate.[1] It was pointed out that if persons were aggrieved, their proper remedy was an appeal to quarter sessions; "And this court never went further, than to oblige the making of a rate, without meddling with the question, who is to be put in or left out; of which the parish officers are the proper judges subject to an appeal."[2] In 1769 the court refused to set aside a rate on the ground of inequality.[3] This could not be done unless it appeared from the justices' own statement of the case that the rate had not been fairly and equally assessed.[4] In this case the justices had considered it to be an equal rate, of which matter they were the proper judges, and there was no evidence that it was otherwise.[5] Nor would the court allow the question of assessment to the poor rate to be brought before them by writ of certiorari[6]—otherwise the poor might starve while the question of the legality of the rate was being considered.[7] But there were ways in which the decisions of quarter sessions could be brought before the court of King's Bench. Quarter sessions could state a case for the consideration of the court on this and other matters connected with rating. If the court quashed the rate its decision was final; but if it decided in favour of the rate, and the rates were enforced by distress, those aggrieved could contest its legality by an action of replevin.[8] It is in the judgments of the court of King's Bench on these questions, and principally in their judgments upon the cases stated by the justices, that the foundations were laid of this and other branches of the law as to rates.

During this period a few of the principles, which have been worked out in great detail by large numbers of modern cases, begin to emerge. The following were the most important:

First, the rate must be based on the value of the property as at the time when the assessment is made.[9] We have seen that that value will depend, as Lord Mansfield pointed out,[10] upon the

[1] R. v. Churchwardens of Weobly 2 Stra. 1259.
[2] Ibid. [3] R. v. Brograve 4 Burr. 2491.
[4] In The King v. Mast (1795) 6 T.R. at p. 156 Lord Kenyon C.J. said, "with regard to the discretion of the justices; if indeed they had confirmed this rate generally, without disclosing to us the grounds on which they proceeded, we could not have quashed the rate, because the inequality does not appear upon the face of it: but they have disclosed those grounds; and on the case, as stated, it is impossible not to say that they have made a mistake."
[5] R. v. Brograve 4 Burr. at p. 2494.
[6] R. v. Inhabitants of Uttoxeter (1732) 2 Stra. 932.
[7] Burn, op. cit. iv 116.
[8] Mersey Docks v. Cameron (1864-1865) 11 H.L.C. at p. 468 *per* Blackburn J.; cp. R. v. Inhabitants of Uttoxeter (1732) 2 Stra. 932.
[9] R. v. Gardner (1774) 1 Cowp. 79; cp. Halsbury, Laws of England (1st ed.) xxiv 27.
[10] R. v. St. Luke's Hospital (1760) 2 Burr. at p. 1064; above 281.

use to which the property is put by the owner; and it will vary with the nature of that use, and with any other circumstances which add to or subtract from its value. Lord Mansfield said:

> If land undergoes any alteration, the assessors must take all the circumstances into consideration when they are about to fix the value: it would be an absurd rule to say, that lands not covered with houses, should pay the same as they did when houses were standing upon them. The rates must be according to the value of the thing rated; and the duties increase according to the increase of agriculture or improvement.[1]

Lord Kenyon said:

> The assessment for the relief of the poor ought to be so contrived, that each inhabitant should contribute in proportion to his ability, which is to be ascertained by his possessions in the parish. Every inhabitant ought to be rated according to the present value of his estate, whether it continue of the same value as when he purchased it, or whether the estate is rendered more valuable by the improvements which he has made upon it.[2]

It followed from these principles (i) that the rent reserved is by no means conclusive as to the rateable value of the property—during a long lease the property may have increased or diminished in value.[3] (ii) That if a building is equipped with machinery, and let as so equipped, the value of the building and machinery must be taken into account to arrive at the rateable value of the property.[4] (iii) That if the value of the land is increased by the fact that it possesses some natural advantage, e.g. a salt or a mineral spring, that advantage, being part of the produce of the land, must be taken into consideration in arriving at its rateable value.[5] (iv) That reasonable expenses incurred in maintaining the property ought to be deducted from the value.[6]

Secondly, the use made of the land by the occupier was a material element in fixing its rateable value.[7] Thus, although tolls as such were not rateable,[8] locks and sluices, which were real and substantial property situated in a parish, were rateable, and the fact that tolls were earned by their means must be taken into account in fixing their rateable value.[9] Similarly, when

[1] R. v. Gardner (1774) 1 Cowp. at p. 84.
[2] R. v. Mast (1795) 6 T.R. at pp. 155-156.
[3] R. v. Skingle (1798) 7 T.R. 549.
[4] The King v. Hogg (1787) 1 T.R. 721, following R. v. St. Nicholas Gloucester (1783) Burn, op. cit. iv 76.
[5] R. v. Miller (1777) 2 Cowp. 619; R. v. Governor and Company of the New River (1813) 1 M. and S. 503.
[6] "The fair average expenses ought to be allowed in estimating the quantum of the rate, but not any extraordinary expenditure which might happen to make the property unprofitable in a particular year: for where it is the subject of annual value, the money so laid out in one year will produce a profit in the subsequent years," The King v. Agar (1811) 14 East at p. 262 *per* Lord Ellenborough C.J.
[7] Above 289 n. 10. [8] Above 283.
[9] R. v. Inhabitants of Cardington (1777) 2 Cowp. 581; cp. The King v. the Mayor of London (1790) 4 T.R. at p. 25 *per* Lord Kenyon C.J.

land was purchased by a dock company and converted into a dock, it was held that the profits made by the company by the use of the dock, must be taken into account in arriving at the rateable value of the property.[1]

Thirdly, rates were payable on property in a given parish.[2] Thus if navigation tolls arose from the occupation of a sluice in a particular parish, the owner of the navigation was rateable in the parish in which the sluice was, though he was not resident there, and though the tolls were actually paid in another parish.[3] But if tolls became due and were received at particular places for a right of passage along a canal, it was only at those places that the canal company was rateable.[4] Buller, J., said :[5]

> It is material to consider at what place the toll becomes due. I agree that if a person has property in Yorkshire, and receives the profits of it in London, he shall not be rated for it in London ; for a toll must be considered to be paid at the places where it becomes due. It is impossible to adopt the argument used at the Bar that the toll becomes due at the end of every mile for that mile ; for it is an entire contract to carry the goods the whole distance intended, and the hire is payable at the place to which by that contract they are to be carried. The case of *Putney Bridge* is an illustration of the present ; there the bridge is rated in Putney and Fulham parishes at £700 a year in each, there being gates at each end ; formerly there was no gate at the Putney end, and then the bridge was not assessed in Putney at all.

On the other hand if a water company had a reservoir in parish A, and conducted the water in pipes through parishes B and C, the profits made by the company arose from the occupation of property in all those parishes ; and therefore the company was rateable in all those parishes in respect of the profits attributable to the possession of its property in each of them. It was therefore held that a rate in parish A on the entire profits of the undertaking was bad.[6]

Fourthly, since the rate is assessed upon the property according to its value in the year of assessment, it is immaterial that the owner may not have received any profit in that year. If profits are in the course of being made by the occupation of property, the property has a certain value each year, and rates are assessable upon that value year by year. Thus, if underwood is cut, and a profit is made by its sale, every twenty-one years, it is rateable according to its value each year, and not

[1] The King v. the Dock Company of Hull (1786) 1 T.R. 219.
[2] Above 280.
[3] R. v. Inhabitants of Cardington (1777) 2 Cowp. 581.
[4] The King v. Undertakers of the Aire and Calder Navigation (1788) 2 T.R. 660.
[5] Ibid at pp. 666-667.
[6] The King v. the Mayor of Bath (1811) 14 East 609 ; cp. The King v. the Rochdale Waterworks (1813) 1 M. and S. 634.

only at the end of the twenty-one years when the profit is actually made. As Lord Ellenborough, C.J., pointed out in the case of *The King v. Inhabitants of Mirfield*,[1]

> instances continually occur in which the occupier is rated, though he has derived no profit during the period for which the rate is made. A new tenant upon an arable farm reaps none of the produce till the autumn after his tenancy commenced, and yet he must pay up to that autumn according to the rent or value of the estate. He must pay beforehand for the future probable produce. His farm is constantly in a progressive state towards producing profit, and he pays for that progress. So underwoods are annually improving in value, and the rates the occupier pays are for that improvement.

Of course if it can be proved that no profit could ever be made in that or any future year, e.g. if a mine had ceased to be productive, no rate could be assessed upon it.[2]

Section 1 of the Act of 1836,[3] which was passed to establish a uniform method of rating, laid down the general principle that rates were to be assessed on the net annual value of the hereditaments rated. It also defined the meaning of the expression "net annual value." Net annual value was to mean,

> the rent at which the hereditament might reasonably be expected to let from year to year, free of the tenant's usual rates and taxes and tithe commutation rent charge if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses if any, necessary to maintain them in a state to command such rent.

This definition no doubt represented the general practice when the Act was passed;[4] and the older rules were preserved by the proviso to the section that nothing in it was to be "construed to alter or affect the principles or different relative liabilities (if any) according to which different kinds of hereditaments are now by law rateable." Later statutes,[5] the emergence of new forms of property and new modes of using property, changes in the machinery of local government, and the rise of new forms of local taxation, have made the modern law as to the basis of assessing rates a complex branch of the law of rating. But it is the principles laid down in the cases of the eighteenth and early nineteenth centuries, of which I have

[1] (1808) 16 East at p. 226.

[2] The King v. Inhabitants of Bedworth (1807) 8 East 387.

[3] 6, 7 William IV c. 96.

[4] "Though the words of this enactment (43 Elizabeth c. 2) might seem to give the overseers a discretion to tax each inhabitant in such arbitrary sum as they might think fit, it has long been settled that the taxation of the different persons must be equal, and in proportion to the value of their respective means. . . . It has always been so held, and the Legislature, by the Parochial Assessment Act (6 and 7 Will. 4 c. 96) has affirmed this principle," Mersey Docks v. Cameron (1864-1865) 11 H.C.L. at p. 461 *per* Blackburn J.

[5] Above 288 n. 10.

given a few illustrations, which are the foundation of this, as of other branches, of this department of law.

The nature of the liability to pay rates.

The character of the remedy given by the law for the enforcement of a right, often influences the character which the law will attribute to the right itself. The remedy given by the statute of 1601 for refusal to pay a rate was distress and sale.[1] Later statutes improved the efficacy of this remedy ; [2] but did not alter its character. Distress is still the remedy given by the law against those who refuse to pay rates duly assessed upon them.[3]

The statute of 1601 gave this remedy against persons who refused to pay a rate.[4] A statute of 1814 gave it against persons who neglected or refused to pay seven days after a legal demand.[5] But a refusal to pay implies that a demand has been made. Therefore it was held in 1705 that a warrant of distress could not be a general warrant made before the rate was imposed ; but that it must be a special warrant, issued after it was proved that the particular person, against whom it was prayed that a warrant should issue, had refused to pay the rate imposed.[6] But this state of the law gave no very adequate security that the person, against whom a warrant was asked for, would have an opportunity to show cause why it should not issue. And so a custom seems to have grown up of first summoning the person, against whom the warrant was asked for, to show cause why it should not issue.[7] It was held in 1746 that the justices, who had refused to sign distress warrants till the party, against whom the warrants were asked for, was summoned, could be ordered by writ of mandamus to sign the warrants.[8] But this case was disapproved of by Lord Kenyon, C.J., in 1795.[9] He ruled that a summons must precede a warrant of distress, in order that the person summoned might be given the opportunity of showing why a warrant of distress should not issue.[10]

[1] 43 Elizabeth c. 2 § 4.
[2] 17 George II c. 38 § 7 ; 54 George III c. 170 § 12.
[3] Halsbury, Laws of England (2nd ed.) x 545-546.
[4] 43 Elizabeth c. 2 § 4.
[5] 54 George III c. 170 § 12.
[6] Tracy v. Talbot 2 Salk. 532 ; cp. Burn, op. cit. iv 109.
[7] Ibid.
[8] R. v. Justices of Middlesex, ibid 109-110.
[9] The King v. Benn and Church 6 T.R. 198.
[10] "A summons must precede a warrant of distress, which is in the nature of an execution. On the summons, the party may shew a sufficient reason to the magistrates why a warrant of distress should not issue. . . . It is an invariable maxim in our law that no man shall be punished before he has had an opportunity of being heard : whereas if a warrant of distress were to be issued without any previous summons, the party would have no opportunity of shewing cause why the execution should not issue against him," ibid.

The remedy given by statute for refusal to pay a rate was therefore a drastic remedy; and it was only natural that the nature of the remedy should have been supposed to have some bearing upon the nature of the liability imposed. It was obviously not a contractual liability. Was it therefore a delictual liability, which would determine if the person liable died after it had been incurred and before it had been satisfied? This question was raised in 1761 in the case of *Stevens v. Evans*.[1] In that case one Vesey had been assessed to the poor rate and had died intestate. Administration was granted to the plaintiff Stevens. After administration had been granted, two justices signed a warrant, in which, after stating that the deceased, and after his death his widow, had refused to pay the rate, directed the defendant to distrain the goods of the deceased. The warrant was executed, and the plaintiff brought trover against Evans, one of the justices who had signed the warrant, and the persons who had executed it, and recovered damages. Denison, J., thought that it could be inferred from the character of the remedy given by the statute, that a person who refused to pay a rate was an offender; and that therefore if the goods were not distrained in his life-time, all remedy was lost.[2] Wilmot, J., agreed that the plaintiff had a good cause of action; but on another ground. Since the warrant had been issued after the death, the goods had vested in the administrator. The administrator, therefore, ought to have been summoned, and asked if he could show cause why he should not pay the rate assessed upon his intestate.[3] He inclined to the opinion that, if the warrant had issued before the death of the person assessed, it would have been good;[4] and he refused to subscribe to the opinion that death would dissolve a liability to pay the rate assessed upon a deceased person. "Though he be called an offender, if he refuse to pay it; yet he can be no otherwise considered as an offender, than every other debtor who refuses or neglects to pay his debts."[5] Moreover, he said that it was the constant practice to allow the payment of such rates by executors and administrators in discharge of their liability to account for the assets.[6]

Burn tells us that he had cited this case at some length because "no other case hath occurred wherein this point hath been considered";[7] and curiously enough the same statement was made

[1] 2 Burr. 1152; S.C. 1 W.Bl. 284. [2] 2 Burr. at p. 1157.
[3] Ibid at pp. 1157-1158.
[4] "At the time of the teste, they were the bona et catalla of the representative. If the teste had been prior to the death, they would have bona et catalla of the deceased," ibid at p. 1158.
[5] 2 Burr. at p. 1158. [6] Ibid. [7] Op. cit. iv 116.

in 1912.[1] But, as Burn points out,[2] the case itself did not decide the question whether a liability to pay rates incurred by a deceased person survives. The actual decision turned entirely upon the irregularity of the procedure employed in the particular case. There can be no doubt that, if no warrant had been issued in the lifetime of the deceased, the right course to take would be to summon the personal representative to shew cause why he should not pay. If the warrant had been issued in the lifetime of the deceased, it is obvious that the prudent course to take would be to summon the representative—whether or not this is legally necessary. That the opinion of Wilmot, J., that the liability survives is correct, seems to me to be obviously true. The liability is a statutory liability to pay, analogous to the contractual liability to pay a debt. It is, as Wilmot, J., said, no more delictual in its nature than the liability to pay a debt; and there is no reason why the liability should not survive in the same way as any other quasi-contractual liability survives.[3] Moreover, it is a liability to which the Legislature has accorded the privilege of preferential payment where it has been incurred by a deceased insolvent.[4] This is really decisive; for it could hardly be argued that a liability which survives when a man dies insolvent does not survive when he dies solvent.

The position of the Crown.

Since the Crown is not named in the statute of 1601, it is not bound by it.[5] It follows that property occupied by the Crown or its servants is not rateable. The application of this apparently simple principle to concrete cases had begun to cause difficulties in the eighteenth century; and those difficulties have increased in the nineteenth and twentieth centuries, with the growing complexity of the machinery of government. In the eighteenth century the chief problem discussed was whether, in

[1] "It is uncertain whether a poor rate is recoverable from the representatives of a person dying solvent after the rate is made," Halsbury, Laws of England (1st ed.) xxiv 68.

[2] Op. cit. 116.

[3] There is no doubt that those quasi-contractual liabilities which were enforceable by the action of indebitatus assumpsit survive, see Hambly v. Trott (1776) 1 Cowp. at p. 375, and cp. ibid at p. 373, cited vol. iii 581 n. 6; as to statutory liabilities we must look at the nature of the liability; if it is a liability which is delictual in its nature, as, for instance, the liability of a director to make compensation for false statements in a prospectus which are not fraudulent, it does not survive, see Geipel v. Peach [1917] 2 Ch. 108; but if it is a liability, such as a liability to pay rates, which is more akin to a liability to pay a debt, there is no reason why it should not survive; as Professor Winfield has said, Province of the Law of Tort 181, "each statute must be taken on its merits."

[4] 51, 52 Victoria c. 62 § 1 (*b*).

[5] Mersey Docks v. Cameron (1864-1865) 11 H.L.C. at p. 463 *per* Blackburn J.; below 354, 355.

any given case, an occupation by a servant of the Crown was a beneficial occupation by the servant in his own right, in which case he was rateable; or whether he occupied merely as an incident to his contract of service, in which case he was not rateable. In the nineteenth and twentieth centuries the chief problem discussed has been the problem whether, in any given case, an occupation by a person or body entrusted with public or governmental functions, is an occupation by the Crown.

(i) The eighteenth-century cases show that if a servant of the Crown was an occupier of Crown property, from which he derived a benefit, he was rateable; but if he occupied the property merely because it was necessary to occupy it in order to fulfil his contract of service, he was not rateable. In the case of *The King v. Terrott*[1] Lord Ellenborough, C.J., stated the principle to be collected from the cases as follows:[2]

> The principle to be collected from all the cases on the subject is, that if the party rated have the use of the building or other subject of the rate as a mere servant of the Crown, or of any public body, or in any other respect for the mere exercise of public duty therein, and have no beneficial occupation of or emolument resulting from it in any personal and private respect, then he is not rateable. The property of the Crown in the beneficial occupation of a subject, whether he be a civil officer of the Crown, as in *Lord Bute's case*[3] (who was ranger of the New Park near Richmond), and in the case of the comptroller of Chelsea Hospital,[4] . . . or as a military officer, as in *Hurdis's Case*,[5] he is in each case equally rateable. For in these cases each of the persons rated had a degree of personal benefit and accommodation from the property enjoyed by him *ultra* the mere public use of the thing; and which excess of personal benefit and accommodation *ultra* the public use may be considered as so much of salary and emolument annexed to the office, and enjoyed in respect of it by the officer for the time being. But if the use or residence upon the property be either as the servant of the Crown and for public purposes only, as in *Lord Somers's case*,[6] or as a mere public officer or servant, or of any other description, such as the superintendent of the Philanthropic Society,[7] the trustees of a meeting-house,[8] the servants at St. Luke's,[9] the Masters in Chancery in respect of their public offices;[10] in all such cases, the parties having the immediate use of the property merely for such purposes, are not rateable; because the occupation is throughout that of the public, and of which public occupation the individuals are only the means and instruments.

The distinction drawn by Lord Ellenborough between occupation as a mere servant of the Crown or merely for the

[1] (1803) 3 East 506. [2] At pp. 513-514.
[3] Lord Bute v. Grindell (1786) 1 T.R. 338.
[4] Eyre v. Smallpace (1750), cited in R. v. Occupiers of St. Luke's Hospital (1760) 2 Burr. at pp. 1059-1060.
[5] The King v. Hurdis (1789) 3 T.R. 497.
[6] Lord Amherst v. Lord Sommers (1788) 2 T.R. 372.
[7] The King v. Field (1794) 5 T.R. 587.
[8] The King v. Woodward (1792) 5 T.R. 79; above 281-282.
[9] R. v. Occupiers of St. Luke's Hospital (1760) 2 Burr. 1053.
[10] Holford v. Copeland (1802) 3 Bos. and Pull. 129.

purposes of executing a public duty, and beneficial occupation in a personal or private respect, is recognized to-day. But we shall now see that when Lord Ellenborough said that occupation, not only as a mere servant of the Crown, but also as the servant of any public body, or in any other respect for the exercise of public duty, was not a rateable occupation, he stated the law very much too widely. This fact is brought out by the line of cases in which the question has been discussed whether the occupation of particular persons or bodies, entrusted with public or governmental functions, is an occupation by the Crown.

(ii) In a broad sense the whole government of the country, local as well as central, is the King's government. It is carried on in his name. But we have seen that, from the earliest times, the local government has been carried on by autonomous bodies ; [1] and that the result of the Great Rebellion and the Revolution was to emphasize their autonomous character.[2] Similarly, when the Crown or the Legislature entrusted governmental or public debts to corporations or bodies of trustees, these bodies possessed a similar autonomous character.[3] The question therefore arose whether all these bodies could be said to be branches of the King's government, and thus exempt from liability to pay rates in respect of the premises which they occupied.

By the middle of the nineteenth century it was established that not only buildings occupied by the great departments of the executive government, but also buildings occupied by the police, or for purposes connected with the administration of justice, were exempt from rates, because they were occupied by the King.[4] It might, as Blackburn, J., said,[5] be difficult to maintain that in all these cases the occupants of these buildings were strictly speaking the servants of the Crown ; "but the purposes are all public purposes of that kind which, by the constitution of this country, fall within the province of Government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered *in consimili casu.*" It was, however, by no means settled

[1] Above 220. [2] Above 133-134. [3] Above 221, 228.

[4] "Long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police, and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of State such as the Post Office, the Horse Guards, or the Admiralty, in all which cases the occupiers might strictly be called the servants of the Crown ; but also to property occupied by local police, to county buildings occupied for the assizes and for the judges' lodgings, or occupied as a county court, or for a jail," Mersey Docks v. Cameron (1864-1865) 11 H.L.C. at pp. 464-465 ; cp. Coomber v. Justices of Berks (1883) 9 A.C. at pp. 67-69 ; and on the whole subject see Harrison Moore, Liability for Acts of Public Servants L.Q.R. xxiii 16-27.

[5] Mersey Docks v. Cameron (1864-1865) 11 H.L.C. at p. 465.

whether the exemption extended further. Lord Ellenborough's statement seems to imply that he thought that property occupied for any public purposes was exempt from liability to pay rates; and this view accorded with the *ratio decidendi* of a series of cases in which Lord Mansfield's reasoning in the case of *R. v. The Occupiers of St. Luke's Hospital*, had been taken to mean that, if property were occupied by trustees for public purposes, that property was not rateable.[1] On the other hand, there was another line of cases in which it had been held that property, though it was occupied for public purposes, was rateable, if it was not occupied by the King, or by departments of the central government, or for governmental purposes for which the Crown is directly responsible.[2] The latter line of cases was followed by the House of Lords in 1864-1865 in the case of *Mersey Docks v. Cameron*.[3] The result is that the exemption from liability for rates does not extend to property occupied by persons or bodies entrusted with the conduct of local government, or with the management of property for public purposes.

The conclusion thus arrived at is in accordance with the spirit of the English constitution. The bodies to which the local government of the country was entrusted have always been, in respect of the greater part of their functions, autonomous bodies, very slightly controlled by the Crown; and just as property occupied by them could not be said in any strict sense to be occupied by the Crown, so their servants could not be said in any strict sense to be the servants of the Crown. We shall see that, just as the property occupied by them is liable to be rated, so, unlike the Crown, they are liable for the torts of their servants like any other person or corporation.[4] It is because they have continued to be autonomous bodies that the large additions made to their functions by modern legislation, has not affected their legal position in respect of either of these two questions. "Purely local services," says Professor Harrison Moore,[5] "are beyond the shield of the Crown; and of national services locally administered—poor law, public health, education—there is probably a bias in favour of treating the administrative authorities as subjects and not as bearing a portion of the sovereignty." It is really a question of the extent of the control of the central government. A certain

[1] Mersey Docks v. Cameron (1864-1865) 11 H.L.C. at pp. 465-469; for Lord Mansfield's statement see above 281; as Blackburn J. pointed out, above 281 n. 14, Lord Mansfield's words do not necessarily mean what Lord Kenyon and Lord Ellenborough appeared to think that they meant.

[2] Mersey Docks v. Cameron (1864-1865) 11 H.L.C. at pp. 469-471.

[3] (1864-1865) 11 H.L.C. 443.

[4] The Mersey Docks v. Gibbs (1864) L.R. 1 H. of L. 93; L.Q.R. xxiii 23-24; below 317-318.

[5] L.Q.R. xxiii 24.

amount of control is consistent with an autonomous existence ;[1] but if that control is so great as wholly to deprive a person or body of an autonomous existence, that person or body becomes simply a department of the central government, and entitled to its immunities.

The development of English public law by judicial decision, has often caused very fundamental questions of public law to be raised in unexpected ways. No better example of this phenomenon can be found than this line of cases upon the ambit of the immunity of property occupied by the Crown from liability to be rated. For it raises, just as the line of cases upon the liability of the units of local government for the torts of their servants raises, the whole question of the constitutional position of these units in the government of the state. The decisions which have drawn a sharp line between the departments and functions of government immediately dependent on the Crown, and departments and functions of government which are to a large extent independent of the Crown, have given a correct technical expression to a characteristic of English public law, which is perhaps the most important of all the results of its long and continuous historical development.

III. *Highways.*

We have seen that there was much legislation as to highways in the eighteenth century ;[2] and that it was by means of many hundreds of private and local Acts that the system of turnpike roads was created to supplement the deficiencies of the ordinary highways.[3] But all these Acts presupposed a background of common law principles, many of which are still in operation, though they are now overlaid by a mass of statutes, larger in quantity and more complex in their contents, than the statutes of the eighteenth century. It is of some of the most important of these common law principles, and of the manner in which they were developed by the courts in this period, that I now propose to say something. I shall deal with this topic under the following heads : the definition, the varieties, and the origins of highways ; the rights of the public and of the owners of the soil in respect of highways ; the duty of repair ; the stoppage and diversion of highways.

Definition, varieties, and origins.

Bracton, having in his mind the first title of the second book of Justinian's Institutes, speaks of the King's highway

[1] L.Q.R. xxiii 24-25. [2] Above 172. [3] Above 207-211.

which, like a *res sacra*, is not the property of anyone, but of the King himself; and he speaks also of military roads which are public, and lead to the sea, to ports, and to markets.[1] He thus emphasizes both the royal and the public character of highways; and, it may be noted that his assertion of their royal character, is connected with the old ideas which come from the time when the area of the King's peace was circumscribed to special areas, amongst which were the principal highways.[2] Bracton's statement, and the cases relating to "ways" in the Year Books,[3] influenced the definition of a highway which is contained in the *Termes de la ley*[4]—"Chemin est le haut voy lou chacun homme passa, qui est appel *via regia*." In this and in later definitions their public rather than their royal character was emphasized; and any road which had this character was given the status of a highway. Hale in 1672 said,[5] "if a way lead to a market, and were a way for all travellers, and did communicate with a great road, etc., it is an highway; but if it lead only to a church, to a private house or village, or to fields, then it is a private way." The term "highway" therefore included footways or bridle ways.[6] In 1717 it was said that a navigable river was a highway;[7] and for this statement there was mediæval authority.[8] Hawkins in 1716[9] accurately summed up the authorities when he said that,

> it seemeth that any one of the said ways, which is common to all the King's people, whether it lead directly to a market town, or only from town to town, may properly be called a highway, and that any such cartway may be called the King's highway; . . . and in books of the best authority a river common to all men is called a highway.

[1] "Imprimis sunt regia via, quae communis esse non potest inter vicinos, nec propria alicujus, sed ipsius domini regis, et quasi res sacra. . . . Idem etiam dici poterit de via militari quae publica dici poterit et ducit ad mare, et ad portus, et quandoque ad mercata," f. 180*b*.

[2] P. and M., H.E.L. (1st ed.) i 22; vol. ii 47-48; Pollock, Oxford Lectures 80-83; it appears from Y.B. 6 Ed. III Pasch. pl. 48 that some thought that there might be a common way which was not a royal road; but Parning anticipated the modern distinction when he said that all roads were royal roads, but that a common road was merely a road for the villagers to get to their fields, i.e. something more analogous to a private right-of-way; the opposite view goes back to the archaic notion, which we get in the Laws of Edward the Confessor, c. 12, that roads, other than the royal roads, were "sub lege comitatus"—a view which was obsolete when Bracton wrote.

[3] See Fitz. Ab. *Chemin* pl. 1; Broke Ab. *Chimyne* pl. 9; cp. ibid pl. 10 = 8 Ed. IV Mich. pl. 7 cited below 304 n. 1.

[4] For this book see vol. v 401; cp. Juridical Rev. xxxvi 165-166; it was first published in 1527 in Norman French.

[5] Katherine Austin's Case 1 Vent. 189.

[6] The King v. Inhabitants of Salop (1810) 13 East at p. 97 *per* Lord Ellenborough C.J.

[7] The King v. Hammond 10 Mod. 382.

[8] 22 Ass. pl. 93 *per* Thorpe.

[9] Pleas of the Crown bk. i c. 76 § 1.

The distinction between a highway and a private way, which Hale draws,[1] was known in the Middle Ages,[2] and was stated by Coke.[3] The one point in which the modern definition of a highway varies from the older definition, is in the insistence by the older lawyers on the rule that a highway must be a "thoroughfare," so that a cul de sac would not be a highway.[4] On this question there were differences of opinion amongst the eighteenth-century lawyers.[5] In the nineteenth century it has been settled that a cul de sac may be a highway;[6] but that it is difficult to establish the fact by mere user, in the absence of the proof of express dedication, unless it can be shown that the public authorities have spent money on maintaining it as a highway.[7]

When Coke wrote his Institutes the law had come to recognize several varieties of highways. He said:[8]

> There be three kinds of wayes whereof you shall reade in our ancient bookes. First a footway . . . and this was the first way. The second is a footway and a horseway; . . . and this vulgarly is called packe and prime way, because it is both a footway, which was the first or prime way, and a packe or drift way also. The third is *via* or *aditus*, which contains the other two, and also a cartway; . . . and this is two fold, viz. *Regia via*, the King's highway for all men, and *communis strata*, belonging to a City or towne, or betweene neighbours and neighbours.

But as Holt, C.J., said, in the case of *The Queen v. Saintiff*, "the word highway is the genus of all public ways."[9]

[1] Above 300.

[2] For cases where this distinction was drawn see Flower, Public Works in Medieval Law (S.S.) ii li and the references there cited.

[3] Co. Litt. 56*a*.

[4] Broke ab. *Chimyne* pl. 6 = Y.B. 39 Hy. VI Mich. pl. 9, where Littleton challenged a plea to an action of trespass that the defendant was merely removing an obstruction to a highway placed there by the plaintiff, on the ground that the plea did not state from what place and to what place the way led; this was upheld, Moile J. saying, "il convient a mettrer coment il ad son chemin, id est de quel lieu a quel lieu; come a dire de tiel clos oustre la terre le pleintiff tanque a tiel clos, ou a son mese oustre le close tanques etc., ou a chemin roial oustre le clos tanques a le dit terre ou mese: si come il serra in bref de Nuisance."

[5] Lord Kenyon C.J. in The Trustees of the Rugby Charity v. Merryweather (1790) 11 East 375-376 *note* said that a highway need not be a thoroughfare; and Lord Ellenborough C.J. in R. v. Lloyd (1808) 1 Camp. 260 expressed the same opinion; in Woodyer v. Hadden (1813) 5 Taunt at pp. 142-143 Mansfield C.J. took the opposite view, with which Lord Cranworth L.C. agreed in Campbell v. Lang (1853) 1 Macq. at p. 453; probably the second view is historically correct, but the first view is obviously more in accordance with modern needs; that the change in the legal point of view was taking place in the eighteenth century under the influence of these needs is, I think shown, by a comparison with Y.B. 39 Hy. VI Mich pl. 9 cited in the last note, with Rouse v. Bardin (1790) 1 H. Bl. 351, where it was held that in pleading that the place was a public highway, as a justification in an action of trespass quare clausum fregit, it was not necessary to state any termini.

[6] Bateman v. Bluck (1852) 18 Q.B. 870.

[7] Bourke v. Davis (1889) 44 C.D. at pp. 122-123; Attorney-General v. Antrobus [1905] 2 Ch. at pp. 206-208.

[8] Co. Litt. 56*a*.

[9] (1703) 6 Mod. at p. 255.

The origin of many of the English highways is lost in the mists of antiquity.

> The earliest highways in England of which there is any sign are the ancient trackways—sometimes just marked out by passing animals—which were used by the British inhabitants. . . . So persistent and unyielding is popular usage, and so little thought has there ever been of changing the course of a public thorough-fare, that we may well imagine these ancient hollow-ways and ridgeways, from Cornwall to Northumberland, to survive, if not even in some lines of Roman road, at any rate in many a sunken lane or moorland track, in many a field path or right of way.[1]

The Romans made the first great through roads, which were the basis of the system of the principal highways till modern times ;[2] and these were the four great roads which, according to the laws of Edward the Confessor and William I, were especially royal roads.[3] Thus very many of the English highways date either from time immemorial or from the Roman occupation. Others were created in different ways in historical times.

First, it was recognized in the eighteenth century that, if an owner in fee simple dedicated land to the public for the purpose of passage, the land, if accepted and used by the public for this purpose, became a highway.[4] Probably this was old law ;[5] but it is not till the eighteenth and nineteenth centuries that the conditions under which a dedication can take place were precisely formulated ; and that rules were laid down as to the evidence from which it can be presumed that a dedication has taken place. These rules are founded partly on rules relating to the land law,[6] and partly on rules laid down as to the proper inferences to be drawn from such matters as the nature and length of user, the acts of the owner, and the fact that the road has been repaired, cleaned,

[1] Webb, The Story of the King's Highway 3.

[2] For these roads see the authorities cited ibid 10-11.

[3] Pollock, Oxford Essays 80-81 ; Laws of William the Conqueror i 26, there cited ; Laws of Edward the Confessor c. 12 ; above 300 n. 2 ; in Y.B. 6 Ed. III Pasch. pl. 48, cited Pollock op. cit., it was said by some that, if the soil of the road belonged to an individual, it could not be a royal road ; no doubt the soil of a royal road was in the Crown ; but no countenance was given to this distinction—it was coming to be recognized that all highways open to the public have the same status whether the soil was in the Crown or in a private person, above 300; below 304.

[4] In the case of Sir John Lade v. Shepherd (1735) 2 Str. 1004, the fact that a highway might arise by dedication was stated by the court as a well-recognized rule of law.

[5] There do not seem to be any references to this mode of creating a highway in the Y.BB. or the Abridgements ; but something that looks like a dedication can be found in a plea to a presentment for non-repair of a causeway in 1375, Public Works in Mediæval Law (S.S.) ii 108.

[6] E.g. the rules that only the owner in fee simple and sui juris can dedicate, and that a copyholder and a lessee cannot dedicate, are deductions from well-recognized principles of the law of real property ; the rules that an owner can dedicate subject to conditions, but that, once having dedicated unconditionally, he cannot afterwards impose restrictions, are deductions from the law as to licences, and from the principle that a grantor cannot derogate from his grant.

or lighted at the public expense.[1] Secondly, a new highway can always be created by statute. In the eighteenth century many highways were created by turnpike Acts and by awards under Inclosure Acts.[2] Thirdly, in the eighteenth century there was some authority for the proposition that a highway might be created by prescription. But the better opinion is that, though an easement giving a private right-of-way to the owner of a dominant tenant over the land of the servient tenant may be so created, it is not possible to create a public highway in this manner. In the first place, prescription presupposes a grant, and a grant cannot be made to an indeterminate body of persons.[3] In the second place, an easement cannot exist without both a dominant and a servient tenement; for no easement can exist in gross.[4] It is, I think, clear that the authorities which support the view that a highway can be created by prescription, do not distinguish between true easements, and customary rights in the nature of easements.[5] But there seems to be no reason why such a customary right should not be created by immemorial user;[6] and, by analogy to the rule that the long continued user of an easement will create the presumption of a lost modern grant,[7] long continued user by the public will create the presumption of a dedication by the owner of the soil.[8]

The rights of the public and of the owners of the soil in highways.

It was well settled in the fifteenth century that the right of the King and his people in a highway was the right of passage,

[1] See Halsbury, Laws of England (1st ed.) xvi 38-44.

[2] Ibid 48. [3] Vol. iii 169-171; vol. vii 343. [4] Ibid 326.

[5] Ibid 325 and nn. 6 and 7; it may be noted that the confusion was an old one, for in Y.B. 6 Ed. III Pasch. pl. 48 and elsewhere in the Y.BB. it was said that the King had an easement of way over a royal road.

[6] Vol. vii 325 and n. 2; it is true that Lord Blackburn in the case of Mann v. Brodie (1885) 10 A.C. at p. 385 said that a public right-of-way could be acquired by prescription at common law; but, at p. 386, he admitted that, in the case of public rights-of-way, the time had not been cut down, as in the case of private rights-of-way, by legal fictions; probably Lord Blackburn was thinking of the rule that a custom which dated from time immemorial would establish a right, vol. iii 167-168 n. 3, and he somewhat loosely applied the term prescription to this mode of acquisition; it would perhaps be more accurate to use the term "prescriptive or immemorial user" in this connection.

[7] Vol. vii 345-349.

[8] "It has been held that where there has been evidence of a user by the public so long and in such manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was. It is therefore never practically necessary to rely on prescription to establish a public way," Mann v. Brodie (1885) 10 A.C. at p. 386 *per* Lord Blackburn; that this was the law in the eighteenth century seems to be clear see R. v. Hudson (1731) 2 Str. 909; Rugby Charity v. Merryweather (1790) 11 East 375-376 note.

and not a right of property in the soil. The right of property in the soil, over which this right of passage existed, might belong to the King or to a private person.[1] These principles were restated by Coke,[2] and are recognized in our modern law.[3] From these principles the following consequences have been drawn :

First, since the right of the public is only a right to pass and repass, no member of the public is entitled to use the highway for any other purpose. The strictness with which the law adhered to that principle is illustrated by the case of *Dovaston v. Payne*.[4] In that case the plaintiff brought an action of replevin for the taking of his cattle. The defendant justified the taking by saying that he was seised of the place where the cattle were taken, and that he had taken them damage feasant. The plaintiff replied that this place adjoined a highway, that the defendant ought to have repaired the hedges between this place and the highway, and it was because he neglected this duty that the cattle, *being in the highway*, escaped from it on to the defendant's land. It was held that this replication was bad, because it had not stated that the cattle were using the road lawfully, i.e. for passage or repassage—for all that appeared in the plea the cattle might have been trespassing on the highway.[5] A fortiori a person commits a tort if, as in the case of *Harrison v. Duke of Rutland*,[6] he uses the highway, not for purposes of passage, but in order to interfere with the lawful user of the land by its owner. But in that case it was said that the rights of the public could not, as the older cases seem to imply, be limited strictly to a right of passage and repassage. As Esher, M.R., said,

> Highways are no doubt dedicated *prima facie* for the purpose of passage ; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual

[1] "*Nota* per touts les Justices que *in regia via* le Roy n'ad auter forsque la passage pur luy et ses people, mes le franktenement, et touts les profits, come arbres etc., est al seigneur del soyle. Et *Catesby* dit que si nuisance soit fait per lever un fosse etc. le Roy doit faire le punishment, et seigneur de soyle la avera action pur foder del terre etc. *quod Nedham concessit*," Y.B. 8 Ed. IV Mich. pl. 7 ; cp. Y.B. 2 Ed. IV Pasch. pl. 21.

[2] "The freehold as well of bridges, as of the highwaies, is in him that hath the freehold of the soile, but the free passage is for all the King's liege people," Second Instit. 705.

[3] Below 305.

[4] (1795) 2 Hy. Bl. 527.

[5] "The law is . . . that if cattle of one man escape into the land of another, it is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came. If it be a close, the owner of the cattle must shew an interest or a right to put them there. If it be a way, he must shew that he was lawfully using the way ; for the property is in the owner of the soil, subject to an easement for the benefit of the public. On this plea it does not appear whether the cattle were passing or repassing, or whether they were trespassing on the highway ; the words used are entirely equivocal," 2 Hy. Bl. at p. 531 *per* Heath J.

[6] [1893] 1 Q.B. 142 ; cp. R. v. Pratt (1855) 4 E. and B. 860—where the accused was on the highway, not for the purpose of passage, but in the unlawful pursuit of game.

mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser.[1]

Thus, in the case of *Hickman v. Maisey*,[2] it was said that sitting down to rest or to sketch by the side of the highway would be a reasonable way of using it.[3] But where, as in that case, the defendant used the highway to watch the trials of the plaintiff's race horses, in order to get information for the purpose of his business as a racing tout, it was held that that was not a reasonable use of the highway.[4]

Secondly, subject to these rights of the public, the owner is entitled to all his rights as owner, and can sue anyone who interferes with those rights. Lord Mansfield said, in the case of *Goodtitle v. Alker*,[5] that all the trees growing upon the land and mines under it belonged to the owner, that he could carry water in pipes under it, and that, subject to the right-of-way, he had all the remedies of an owner.

An assize would lie if he should be disseised of it: an action of trespass would lie for an injury done to it. . . . I see no ground why the owner of the soil may not bring ejectment as well as trespass. It would be very inconvenient to say that in this case he shall have no specific legal remedy; and that his only relief should be repeated actions of damages, for trees and mines, salt springs, and other profits under ground. It is true indeed that he must recover the land subject to the way: but surely he ought to have a specific remedy to recover the land itself.

It was upon these principles that it was held in 1809 that a plaintiff could sue a defendant who had depastured his cattle on a highway, the soil of which belonged to him, the plaintiff;[6] and that, in 1884, it was said that the owner of the soil could restrain a person from erecting a telephone wire across a street.[7]

Two other consequences of the respective rights of the public and the owner of the soil, which were of considerable importance in the eighteenth century and earlier, are now chiefly of antiquarian interest, owing to the statutory reforms in road management effected during the nineteenth century.

First have the public a right to deviate over adjoining land if the highway becomes founderous?

It was laid down in *Henn's Case* in 1632[8] that, where a

[1] [1893] 1 Q.B. at pp. 146-147. [2] [1900] 1 Q.B. 752.
[3] At p. 756 *per* A. L. Smith L.J. [4] Ibid.
[5] (1757) 1 Burr. at pp. 143-144; cp. Sir John Lade v. Shepherd (1735) 2 Str. 1004.
[6] Stevens v. Whistler (1809) 11 East 51.
[7] Wandsworth Board of Works v. United Telephone Co. (1884) 13 Q.B.D. at p. 927 *per* Fry L.J.
[8] W. Jones 296-297; Duncomb's Case (1634) Cro. Car. 366 is authority for the proposition that an owner who incloses must repair, but nothing is said as to

landowner had inclosed his land on each side of a highway, he must keep the highway in repair; and that, if he did not, the public could deviate and pass over the adjoining inclosed land. In 1678 it was held that, where the plaintiff had stopped a way, the defendant could justify a trespass over the plaintiff's adjoining close; and the court laid it down as a general proposition that, "if the way be so foul as is not passable, I may then justify going over another man's close next adjoining."[1] Holt, C.J., gave a similar ruling at nisi prius in 1698;[2] so that this right to deviate had come to be stated as a general right, and not, as the earlier cases stated it, as a right against a particular person arising out of an inclosure made by that person, or a stoppage of the highway effected by him. In these circumstances it is not surprising that both Hawkins[3] and Blackstone[4] stated that there was a general right of deviation if the highway was founderous. Lord Mansfield stated the law in the same way, and, from this point of view, contrasted the rights of the public over a highway, and the rights of the grantee of an easement of way.[5] These statements of the law have been repeated in nineteenth-century cases,[6] and by nineteenth-century text-book writers.[7] I think that it is clear, first, that the establishment of this general right to deviate rests ultimately upon the dicta in cases of 1678 and 1698, which were approved by dicta and text-book writers in the eighteenth and nineteenth centuries. Secondly, I think that the law so laid down was probably reasonable, having regard to the condition of many of the tracks over open and uninclosed land.[8] As Cockburn, C.J., said in the case of *Arnold v. Holbrook*, "in ancient times the right might exist; in those days the road passed over uncultivated tracks and the liability to repair was not well established, and for public convenience

the right to deviate; the statement made by Blackburn J. in Arnold v. Holbrook (1873) L.R. 8 Q.B. at p. 100 that the dicta as to the right to deviate are founded upon Duncomb's Case seems to be mistaken.

[1] Absor v. French (1678) 2 Shower 28.

[2] Young v. Anon. (1698) 1 Ld. Raym. 725, where Holt C.J. said, "every man of common right may justify the going of his servants or of his horses upon the bank of navigable rivers for towing barges, etc., to whomsoever the right of the soil belongs, and if the water of the river impairs and decreases the banks, etc., then they shall have reasonable way for that purpose in the nearest part of the field next adjoining to the river. And he compared it to the case where there is a way through a great open field, which way becomes founderous, the travellers may justify the going over the outlets of the land not inclosed next adjoining."

[3] Pleas of the Crown bk. i c. 76 § 2. [4] Comm. ii 36.

[5] Taylor v. Whitehead (1781) 2 Dougl. at p. 749.

[6] See Bullard v. Harrison (1815) 4 M. and S. at pp. 392-393 *per* Lord Ellenborough C.J.; Dawes v. Hawkins (1860) 8 C.B. N.S. at p. 859 *per* Byles J.

[7] Gale, Easements (7th ed.) 462-463; Williams, Real Property (9th ed.) 311, and the other books cited in argument in Arnold v. Holbrook (1873) L.R. 8 Q.B. at p. 99.

[8] See Webb, The Story of the King's Highway 6-7, 71-72.

the passengers were obliged to do the best they could." [1] But it is obvious that, at the present day, a general right to deviate is unnecessary, so that it would seem to be open to the courts to disregard dicta which were founded on a consideration of past needs, and to revert to the narrower basis upon which this right was rested in the earlier part of the seventeenth century. This in fact seems to have been the view which was taken by Blackburn, J., in the case of *Arnold v. Holbrook*.[2]

Secondly, could the public right of passage over a highway be made subject to the payment of a toll otherwise than by statutory authority?

A private person could not assume the right to take a toll at his mere will and pleasure; for the right to take a toll was a franchise which could only be granted by the Crown.[3] When granted, it was one of that miscellaneous collection of incorporeal hereditaments known to the mediæval common law, which could be granted over and otherwise dealt with as property.[4] But, since the right to take tolls was a right to extract money from the subject, which might easily lead to oppression,[5] the conditions under which this right could be granted by the Crown were, from the mediæval period onwards, laid down with some precision by the common law. The general principle was stated by Gascoign in 1412 to be that "the King can charge his people of this realm without the special assent of the Commons for a matter which can be for the common profit of his people"—for instance he could grant to a person the right to take pontage in consideration of the fact that he had undertaken the construction and repair of a bridge, or murage in consideration of the fact that he had undertaken the construction and repair of the walls of a town.[6] On the other hand, the grant of a right to take a toll by way of murage, where formerly there was a free passage, was unlawful.[7] Similarly, the King could grant to a landowner the right to take a toll in consideration of his allowing the public to pass over his land,[8] or he could grant to any person the right to take a toll in consideration of his undertaking the liability of repairing the road.[9]

[1] (1873) L.R. 8 Q.B. at pp. 99-100.

[2] Ibid 100-101.

[3] "For no man can take a settled or constant toll even in his own private land for a common passage without the King's licence," Hale, De Jure Maris Pt. I c. 3, Harg. Law Tracts 10; this would seem to decide in the negative the question left open in Austerberry v. Corporation of Oldham (1885) 29 C.D. at pp 770, 779, 783, whether, without the Crown's authority, a dedication of a road subject to toll is legally possible; on the other hand, if the Crown's authority were got, it would seem that such a toll would be a perfectly valid toll traverse, below 308.

[4] Vol. ii 355-356.

[5] Below 308 n. 2, 309 n. 2.

[6] Y.B. 13 Hy. IV Hil. pl. 11 (p. 14).

[7] Ibid (p. 15).

[8] Y.B. 5 Hy. VII Mich. pl. 22 (p. 10).

[9] Smith v. Shepherd (1599) Cro. Eliza., at p. 711, cited below 308-309.

As early as the fourteenth century these two cases, in which the King could grant the right to take a toll, had given rise to two kinds of toll—toll traverse and toll thorough. The first was a toll which was granted to a landowner in consideration of his permission to the public to pass over his land; and no question was ever raised as to the legality of the grant of a toll of this kind. The second was a toll which was granted to a person who was not the owner of the soil over which the road passed.[1] It was prima facie illegal, because it restricted the right of the King's subjects to pass and repass freely on the highway;[2] and it could only be justified if it could be proved that the grantee had given some consideration for the grant, such as an undertaking to repair the highway.[3] Both kinds of toll, being capable of being granted, could be prescribed for; but it was obviously more difficult to establish a claim to a toll thorough by prescription, because it was more difficult to presume a consideration for the grant in a case where private ownership of the soil could not be proved, and where it was clear that, from time immemorial, the public had had a right of passage over it.[4]

These principles had been substantially ascertained in the mediæval period; they were applied and elaborated in the seventeenth and eighteenth centuries; and they occasionally emerge in nineteenth-century cases.

In 1599 Popham, C.J., thus summed up the law:

> One may have toll traverse by prescription; and so he may have toll thorough, but it ought to be for some reasonable cause, which must

[1] F.N.B. 518 n. (*c*).

[2] "Thorough-toll ne peut estre dit mes chose pris en oppression de people: car home appelle proprement Thorough-toll l'ou home passe parmi un vill en le haut strete, en quel cas tolle a prendre par le Ley n'est pas maintenir, pur ceo que le usage est proprement encontre le Common Ley et droit . . . mes il y ad toll travers que est proprement dit la ou home passe oustre auter soil en chemin, nient haut strete; en ceo cas poet home avower pur tiel toll, si la chose ad este use de temps etc., car en la haut strete le Roy ne peut nul home la prise de Thorough-toll avower pur ceo que haut strete est common a toutz," 22 Ass. pl. 58 *per* Thorpe J.

[3] This is contrary to the opinion of Thorpe J., see last note; but it is the rule stated in Smith v. Shepherd (1599) Cro. Eliza at p. 711, cited below 309 n. 1; in fact opinions seem to have been divided as to its legality in the Middle Ages, as is shown by the difference of opinion whether it could be prescribed for, see next note; if it could be prescribed for, and this was the better opinion, it was obviously capable of being granted and so justifiable if the grant was made for a proper consideration.

[4] It is partly for this reason that opinions differed as to the legality of toll thorough in the Middle Ages, and partly because some regarded it as an oppressive exaction, 22 Ass. pl. 58 note 2 above; in Y.B. 35 Hy. VI Mich. pl. 33 (p. 29) Fortescue said that a man could prescribe for toll traverse and not for toll thorough, but Prisot said that the King could prescribe; in Y.B. 5 Hy. VII Mich. pl. 22 (p. 10) Fairfax thought that a man could prescribe for either toll traverse or toll thorough; in Smith v. Shepherd (1599) Cro. Eliza at p. 711 Popham and Gawdy differed on this matter; but Popham's view that it could be prescribed for came to be the accepted view, see F.N.B. 518 notes (*b*) and (*c*); in James v. Johnson (1677) 2 Mod. at p. 144 cited below 309 n. 1 its legality was admitted, and therefore its capacity to be acquired by prescription.

be shown, viz. that he is to maintain a causeway, or to repair a way, or a bridge or such like. And the Queen at this day may grant such toll, being but a petite thing, in respect it shall be a greater benefit or ease to the people, for the repairing of a dangerous way, or the like.[1]

In the case before the court Popham, C.J., though he admitted the possibility of acquiring a toll thorough by prescription, thought that in this case the toll thorough had not been shewn to have had a lawful beginning, and so he held it to be illegal. It is clear that, as in Edward III's reign, so in Elizabeth's reign, claims to toll thorough were jealously scrutinized ; and the courts maintained the same attitude in the eighteenth century. Lord Camden in 1766 emphasized the fact that the courts were always jealous of these claims to toll thorough, because they were claims to levy money upon the subject.[2] But if, as in the case of *Pelham v. Pickersgill*,[3] it could be proved that the Crown had levied a toll in consideration of the right of passage over its land, and that toll had always been paid, the toll was legal, for there was a valid consideration ;[4] and those in whom the right to take the toll had become vested, could make a good title to it. In such a case it in fact approximated, as Buller, J., said,[5] to a toll traverse, or as Ashhurst, J., said,[6] toll thorough and toll traverse were, in these circumstances, the same thing. In the nineteenth century these principles were discussed by Willes, J., in a very learned judgment ;[7] and it was pointed out that neither toll thorough nor toll traverse could be claimed in respect of a passage over land, from a person to whom the owner of the land and the

[1] Smith v. Shepherd (1599) Cro. Eliza. at p. 711 ; but "Gawdy doubted upon the reason of the case 22 Ass. 58 whether such a toll may be claimed by prescription," i.e. he doubted the legality of such a toll ; but in R. v. the Corporation of Boston (1628) W. Jones 162 Popham's view was followed ; and also in James v. Johnson (1677) 2 Mod. at p. 144, where it was said, "if the defendant had said this was toll for passing the highway he must shew some cause to entitle himself to the taking of it, as by doing something of public advantage."

[2] "Toll traverse, or for going through a man's private land, may be prescribed for without any consideration ; and payment time out of mind is sufficient, and will support the prescription. In the case at Bar toll is demanded of the subject in the King's highway for passing there ; the subject ought to have a benefit for paying it ; the consideration here is for repairing, cleansing, and maintaining divers and many streets in Gainsbrough, not for repairing etc. all the streets therein ; how therefore can we say that the plaintiff's waggon was passing through any street repaired by the lord of this manor. . . . Courts are exceedingly careful and jealous of these claims of right to levy money upon the subject ; these tolls began, and were established by the power of great men," Truman v. Walgham and Key (1766) 2 Wils. at p. 299 ; the similarity of Lord Camden's views to those of Thorpe J. in Edward III's reign, above 308 n. 2 is striking.

[3] (1787) 1 T.R. 660.

[4] This was exactly the case put by Prisot in Y.B. 35 Hy. VI Mich. pl. 33 (p. 29) when he said, "le Roy puit prescriber pur thorough toll : car puit estre que le chemin fuit la ordein per cause de toll."

[5] 1 T.R. at p. 670. [6] Ibid at p. 668.

[7] The Brecon Markets Co. v. the Neath and Brecon Railway Co. (1872) L.R. 7 C.P. at pp. 564-569.

toll had conveyed the land without any reservation of the toll.[1] But in 1872, when this case was decided, this learning as to tolls had become obsolete law. In fact it was becoming obsolete law in the eighteenth century. We have seen that then the commonest form of toll was that levied by the turnpike trusts under statutory powers.[2]

The duty of repair.

We have seen that the persons liable to the performance of this duty, its extent, its extinction, and the manner of its enforcement, had been defined by a series of statutes which began in the middle of the sixteenth century,[3] and increased both in number and elaboration during the eighteenth century.[4] But the statute law on these matters presupposed a background of common law principles; and in this branch of the law relating to highways, as in other branches, it is the combination of these common law principles with the statutes passed in the eighteenth and nineteenth centuries, which has created the modern law on this subject. At this point I shall deal briefly with the history of some of the leading common law principles on these three allied topics—liability to repair, its extent and extinction, and its enforcement.

Liability to repair.—We have seen that the courts which administered justice in, and conducted the local government of, mediæval England were very various in their origins. There were communal, franchise, feudal, and manorial courts, which took their rise in different principles, and thus reflected the diverse origins of the authority of the many different persons and bodies who then exercised governmental functions.[5] The diversity of the origins of these organs of local government is an index to the diversity of the principles which made up the law as to the performance of their functions; and so in the Middle Ages it followed that the duty of repairing the highways was not governed by any single principle. Mr. Flower says:[6]

> Fundamentally, liability arises in every case *racione tenure*, if indeed, it is more than a truism to say that any particular liability or privilege arose in this way under the system of law devised on and for the feudal principle; but the varieties of tenure are numerous. It can be communal or individual; liability may or may not be divided; the nearest tenant may be liable; or on the other hand a definite tenement, not necessarily adjacent to the road or bridge in question, may carry with it the charge of repair; or it may adhere to those whose tenement derives

[1] At pp. 568-569.
[2] Above 208.
[3] Vol. iv 156; vol. vi 324; above 171-172; below 311, 313-319.
[4] Above 172.
[5] Vol. i 64-65.
[6] Public Works in Mediæval Law (S.S. ii xli; and see ibid xli-xlvii for references to cases which illustrate these various principles.

most benefit from the work. In some cases the last two principles may coincide. Sometimes liability is assigned on the ground of prescription.

It was the legislation of the Tudor and Stuart periods, beginning with the statute of 1555,[1] which introduced the general principle that the parish is the body which is liable for the repair of the highways. At the same time the law recognised several survivals from the mediæval period, which made other persons or bodies liable for repair *ratione tenurae*, *ratione clausurae*, or by prescription. Let us glance rapidly, first at the general principle, and secondly at the mediæval survivals.

(i) Just as some of the legislation of the reign of Edward I introduced principles which came to be recognized as fundamental principles of the common law,[2] so the legislation of the Tudor period introduced principles which attained a similar status. One of these principles was the liability of the parish for the repair of the highways. "If it be a publick way," said Hale,[3] "of common right the parish is to repair it, unless a particular person be obliged by prescription or custom." "It is an uncontrovertible position," said Ashhurst, J.,[4] "that by the general law of the land the parish at large is prima facie bound to repair all highways lying within it, unless by prescription they can throw the onus on particular persons by reason of their tenure: but when that is the case, it is by way of exception to the general rule." It followed from this general rule, first that, if a parish were indicted for not repairing a highway, it could not plead not guilty and give in evidence that some other person was bound by tenure or prescription to repair, but it must, in order to discharge itself, plead and prove the tenure or prescription which made the other person liable;[5] secondly, that if particular persons were made liable by statute, and they became insolvent, the liability of the parish could be revived;[6] and, thirdly, the fact that some other person or body was made liable by statute would not exempt the parish unless the statute specially exempted it.[7]

(ii) A person may be bound to repair a highway (*a*) *ratione tenurae*, (*b*) *ratione clausurae*, or (*c*) by prescription.

(*a*) After the statute Quia Emptores,[8] a liability to repair

[1] 2, 3 Philip and Mary c. 8.

[2] E.g. the statute De Donis Conditionalibus, and the statute Quia Emptores.

[3] Katharine Austin's Case (1672) 1 Vent. 189; cp. 3 Salk. 182.

[4] The King v. Inhabitants of Sheffield (1787) 2 T.R. at p. 111.

[5] 3 Salk. 183; R. v. Stoughton (1670) 2 Wms. Saunders 159 note; Hawkins, Pleas of the Crown bk. I c. 76 § 9.

[6] Anon. (1698) 1 Ld. Raym. 725 *per* Holt C.J.; The Queen v. Inhabitants of Bradfield (1874) L.R. 9 Q.B. 552; above 208.

[7] R. v. Inhabitants of St. George, Hanover Square (1812) 3 Camp. at p. 224 *per* Lord Ellenborough C.J.

[8] 18 Edward I c. 1.

ratione tenurae could not be created by the reservation of this service, upon a grant of land for an estate in fee simple by A to B, because, by such a grant, no tenure between them was created.[1] But such a liability can be created by the reservation of this service upon a grant from the Crown for an estate in fee simple, because a tenure between the Crown and the grantor is created by such a grant;[2] and it could be created by the reservation of this service upon a grant from A to B for a lesser estate than an estate in fee simple, such as an estate tail.[3] In the latter case the rule that the service must be reserved to the grantor was relaxed because the service was for the interest of the public in whom the grantor was included.[4] But this method of creating a liability to repair went out of use, because it was easier to make provision for the repair of highways by means of a charitable trust.[5] (*b*) The prevalence of the common or open field system of agriculture[6] explains the existence of the liability to repair *ratione clausurae*. It was held in *Duncomb's Case* in 1635[7] that, if a man inclosed his land on both sides of a highway passing over the common fields, he was bound to repair the highway. If he inclosed his land on one side of a highway, and the other side was uninclosed, or was inclosed by an ancient inclosure, he was bound to repair half the highway.[8] The reason assigned for this rule was that, since the owner had inclosed for his own convenience, he ought to repair the road;[9] and, for the same reason, if he did not, the public might break

[1] Vol. iii 80-81. "In the strict sense of the term the liability ratione tenurae, unless arising from a grant by the Crown, must have its origin in a grant before the statute Quia Emptores; and, if the facts are such as to justify the presumption, we are bound to make it," Ferrand v. Bingley Urban Council [1903] 2 K.B. at p. 451 *per* Wills J.

[2] Vol. iii 81; The King v. Buckeridge (1691) 4 Mod. 48; R. v. Bucknall (1702) 2 Ld. Raym. 792.

[3] "Si on fait feoffement devant le Statute, ou done in tail puis le Statute, a tenir de luy a faire un pont ouster tiel terre; ou a faire beacon in la terre done; ou a trover home a garder le castle le Roy que est adjoinant al mer; ce est bon, pur ce que le donor ou feoffor ad advantage de ceo, pur ce qu'il est pur le Commonwealth de Royaulme, et issint il ad advantage. Mes si on done terre a tenir a luy, a doner rent a estranger, ou a equiter ove un estranger, ce n'est bon; car ce n'est pur le Commonweal, et le feoffor ou donor n'ad advantage de ceo," Y.B. 11 Hy. VII Hil. pl. 3 *per* Fineux C.J.; to the same effect is Y.B. 12 Hy. VII Pasch. pl. 1 (p. 18) where the repair of a highway is mentioned.

[4] Last note.

[5] The repair of highways is mentioned in the preamble to 43 Elizabeth c. 4; see vol. iv 398; Porter's Case (1592) 1 Co. Rep. at f. 26*a*.

[6] For this system see vol. ii 56-61.

[7] Cro. Car. 366.

[8] R. v. Stoughton (1670) 1 Sid. 464; Hawkins, Pleas of the Crown bk. I c. 76 § 7; cp. Steel v. Prickett (1819) 2 Starkie at p. 469 *per* Abbott C.J.; the liability did not arise if the inclosure were made under an inclosure award made by commissioners acting under statutory powers, R. v. Inhabitants of Flecknow (1758) 1 Burr. 461.

[9] "Because he had made the hedges and inclosure in that manner, he at his peril ought to maintain the way," Duncomb's Case (1635) Cro. Car. 366.

down the inclosure and go over the land inclosed.[1] It followed logically that, if the inclosure was taken away, the duty to repair ceased.[2] (*c*) The duty to repair *ratione tenurae* might be proved by prescription ;[3] and, if the duty was sought to be proved in this way, it might be negatived by showing that it arose within the time of legal memory.[4] But there seems to be no reason why, in a proper case, a continuous practice of repairing might not be evidence of a lost grant made under the condition that the highway was repaired.[5] It was laid down in 1482 that, if it was sought to render a corporation liable in this way, it could be alleged that the corporation had always been bound, and that it was not necessary to allege that it was bound by its tenure of certain land ; but that, if it was sought to render an individual liable in this way, it must be alleged that he was bound by virtue of the tenure of land which he had inherited.[6]

The liability in the case of the parish rested upon the inhabitants of the parish who occupied land ;[7] and the liability *ratione tenurae* or *ratione clausurae* upon the occupiers of land so held[8] or so inclosed ;[9] but the occupiers, if not the owners of the land, would generally be entitled to be reimbursed by the owner.[10]

Extent and extinction.—The duty of the persons or bodies liable to repair is to make the existing highway reasonably fit to carry the traffic of the district.[11] Thus, if an indictment did

[1] 3 Salk. 182 ; above 306-307.

[2] In this respect it differed from a liability to repair *ratione tenurae*—" as soon as the defendant leaves the incroachment open to the highway again, whereby the incroachment ceases, he is discharged from repairing the highway for the future ; but where a man is bound to repair a highway by reason of tenure of any lands, although he leaves them open to the highway, yet he is always bound to repair the highway," R. v. Stoughton (1670) 2 Wms. Saunders at pp. 160-161 *per* Kelynge C.J.

[3] Y.B. 21 Ed. IV Mich. pl. 4.

[4] See R. v. Lady Sutton (1838) 8 Ad. and E. 516.

[5] See Mayor of Hull v. Horner (1774) 1 Cowp. 102, where, after a possession of a right to take tolls for three hundred and fifty years, a Crown grant was presumed ; the principles laid down by Lord Mansfield C.J. at pp. 108-109 would apply to the prescription of a lost grant in this case.

[6] " *Sulyard :* Il n'est a purpose a dire que il et touts ses ancestors ont use etc. *Fairfax* J. : Ceo est voici pur ceo que il ne poit estre charge per l'act son ancestre sans aucun profit d'estre prise pur ceo : Mes auterment est d'un Abbe, car la est bon presentment a dire que l'Abbe de W. et touts ces predecessors out use etc. sans aucun tenure, pur ceo que cest mystical corpus del Abbe ne unque morust, et l'office et le meason continua a les successors en fee. . . . Et d'autrement commune person si soit charge come il est icy, ceo serra per son tenure. Et issint fuit l'opinion de touts," Y.B. 21 Ed. IV Mich. pl. 4.

[7] Hawkins, Pleas of the Crown bk. I c. 76 § 5 ; R. v. Inhabitants of Ecclesfield (1818) 1 B. and Ald. at pp. 357-358.

[8] 1 Rolle Ab. *Chemin* B. 2 p. 390 ; cp. R. v. Barker (1890) 25 Q.B.D. at p. 218.

[9] R. v. Ramsden (1858) E.B. and E. 949 ; cp. Cuckfield Rural District Council v. Goring [1898] 1 Q.B. 865.

[10] Baker v. Greenhill (1842) 3 Q.B. 148.

[11] Halsbury, Laws of England (1st ed.) xvi 101.

not allege that the highway was out of repair, but only that it was muddy, the indictment was bad.[1] The persons or bodies liable to repair are not bound to widen or otherwise alter an existing highway to meet new needs.[2] If the highway was merely a footpath the duty was only to make it fit for use by foot passengers.[3] It was said also that, if a person is under a prescriptive liability to repair, "he is not bound to put it into better repair than it has been time out of mind before."[4] The liability to repair ceases if the highway is lawfully stopped up,[5] or has been physically destroyed, e.g. by the sea;[6] and if the character of the highway has been so altered that it has become in effect a wholly different highway, a liability to repair *ratione tenurae* or, it would seem, *ratione clausurae*, is extinguished.[7] We have seen that a liability to repair *ratione clausurae* ceased when the inclosure was taken away.[8] A lawful diversion of a highway[9] will extinguish the liability as to the old way, and create a corresponding liability as to the new way.

Enforcement.—Bracton had laid it down that it was for the King to take action to enforce duties in relation to highways, and to correct wrongs committed in respect of them.[10] Hence it was well recognized in the Middle Ages that duties in relation to the highways, and wrongs committed in respect of them, were enforced or redressed by the machinery of presentment and indictment.[11] In 1466 it was said by Heydon that, "if there be a common way which is not repaired, so that I am damaged by the miring of my horse, I shall never have an action against him who ought to repair the way, but the complaint is concerning a matter which affects the public; and in such a case no man shall have his action for this, but the remedy is by way of presentment."[12] Coke repeated this rule, and laid it down

[1] R. v. Inhabitants of Stratford (1705) 2 Ld. Raym. 1169.

[2] The King v. Inhabitants of the County of Devon (1825) 4 B. and C. 670, overruling a dictum of Lord Kenyon C.J. in R. v. Inhabitants of Cumberland (1795) 6 T.R. 194 to the effect that a county is bound to widen a bridge as occasion may require; we shall see that at common law no one was obliged to make new bridges or *semble* new highways, below 323.

[3] See R. v. Inhabitants of Cluworth (1704) 1 Salk. 359; cp. R. v. Inhabitants of Cricklade Saint Sampson (1850) 14 Q.B. at p. 741.

[4] R. v. Inhabitants of Cluworth (1704) 6 Mod. 163 *per* Holt C.J.

[5] Below 321-322. [6] R. v. Bamber (1843) 5 Q.B. 279.

[7] R. v. Barker (1890) 25 Q.B.D. 213.

[8] Above 313. [9] Below 321-322.

[10] "Si autem via publica, vel regia extra civitatem vel burgum eodem modo pertinet ad regem emendatio," f. 210*b*.

[11] Public Works in Mediæval Law (S.S.) *passim*; for details of the procedure see ibid ii xxxii-xl.

[12] "Si un comen voy soit, et n'est repaire, issint que jeo suy damage per le myring de mon cheval, jeo n'avera accion de ceo vers cestuy que doit repairer le voy, mes ceo est action populer, en quel cas nul home singuler avera accion de ceo, mes ceo est action per voy de presentment, *quod nota per Heydon*," Y.B. 5 Ed. IV Pasch. pl. 24; as to the meaning of the phrase "ceo est action populer" see Clerk and

that for neglects and defaults, which prevented the proper enjoyment of the right of passage, the proper remedy was presentment and indictment.[1] The rule that for a neglect to repair, that is for a non-feasance, no action will lie at the suit of a person who has suffered damage by this neglect, became a settled principle of English law, which has been repeatedly recognized in the modern cases.[2] Various reasons have been given for the rule at different periods. The Year Book of Edward IV assigned as a reason the fact that the complaint was concerning a matter which affected the public.[3] Coke said that the rule was made in order to avoid multiplicity of suits.[4] Vaughan, C.J., said that the rule was due to the fact that the bodies, on whom the duty of repair lay, were not corporate bodies, and that therefore no action would lie against them.[5] This reason was repeated by Lord Kenyon, C.J., in 1788;[6] and he and Ashhurst, J., added the further reasons that the law had always been so, that, if a further remedy was needed, it could only be given by the Legislature, and that, if such a remedy were given, it would be difficult to apply it in practice since it would involve an attempt to collect the damages from each individual in the county.[7] Not only has the Legislature not given a remedy, but it has been held that, when the Legislature transferred the duty of repair from the parish to other bodies, those bodies inherited the immunity from being sued by particular persons who were injured by the neglect of their duty to repair.[8]

Lindsell, Torts (4th ed.) 33 n. (*a*); they show that it does not mean, what some of the judges in several cases have taken it to mean, that the reason why the action did not lie was the fact that the public were liable to repair; but that it means that "the matter of complaint is common to the whole public"; as it was said in Y.B. 2 Ed. IV Pasch. pl. 21 the remedy was by way of presentment and indictment because the offence was "ad nocumentum totius populi domini regis."

[1] "If the way be a common way, if any man be disturbed to goe that way, or if a ditch be made over-thwart the way so as he cannot goe, yet shal he not have an action upon his case, and this the law provided for avoyding of multiplicity of suites, for if any one man might have an action, all men might have the like," Co. Litt. 56*a*.

[2] Thomas v. Sorrell (1674) Vaughan at pp. 340-341; Russell v. the Men of Devon (1788) 2 T.R. 667; Cowley v. Newmarket Local Board [1892] A.C. at p. 353; Municipality of Picton v. Geldert [1893] A.C. at p. 527.

[3] Above 314 n. 12.

[4] Above n. 1; and a somewhat similar reason was given by Baldwin C.J. in Y.B. 27 Hy. VIII Mich. pl. 10 when he said, "car per meme le reason que meme le person aura accion pur ceo, per meme le reason chescun aura sur ceo, et donques il sera puni c. fois per meme le case."

[5] "The reason is because a foundrous way, a decay'd bridge or the like, are commonly to be repaired by some township, vill, hamlet, or a county who are not corporate, and therefore no action lies against them for a particular damage, but their neglects are to be presented, and they punish'd by fine to the King," Thomas v. Sorrell (1674) Vaughan at p. 340.

[6] Russell v. the Men of Devon 2 T.R. at p. 672.

[7] Ibid at pp. 672-673.

[8] Young v. Davis (1862) 7 H. and N. 760; Gibson v. the Mayor of Preston (1870) L.R. 5 Q.B. 218; Maguire v. Corporation of Liverpool [1905] 1 K.B. 767

In the Middle Ages it was clear that the only remedy for non-feasances or for misfeasances in relation to the highways was indictment; and that neither for non-feasances nor for misfeasances could individuals bring an action for the damage which they had suffered. For this rule the logical reason was given, that the complaint was of a matter which affected the public, and so the remedy should be a criminal and not a civil remedy.[1] But this reason ceased to be so logical a reason when the law came to allow an action on the case to be brought by a particular person who could prove that he had suffered a special damage from a misfeasance committed by another person. It is clear also that this modification of the law rendered the reasons given by Coke, Vaughan, and Kenyon less adequate to explain why, in cases of non-feasance, a person particularly damaged was unable to sue.

This modification of the law was made during Henry VIII's reign. In 1536, in the last of the Year Books, the question whether a plaintiff who had suffered a particular damage by the stoppage of a highway could sue, divided the court. Baldwin, C.J., followed the older cases, and held that no action would lie —it was a common nuisance, remediable by presentment and indictment; and, if any private person could sue, there could be a multiplicity of actions.[2] But Fitzherbert, J., held that for such a misfeasance an action would lie, if the plaintiff could show that he had suffered a special and particular damage.[3] Fitzherbert's view prevailed. Coke followed his reasoning, and laid it down that if "any man hath a particular damage, as if he and his horse fall into the ditch, whereof he received hurt and loss, then for this special damage which is not common to others, he shall have an action upon his case."[4]

Both Fitzherbert and Coke seem to have been contemplating a case where some person, not being a person or body liable to repair the road, does some act of misfeasance in relation to a highway, whereby another person suffers a special and particular damage. In such a case the latter can bring his action on the case and recover. From the seventeenth century onwards many cases are reported in which such actions were successfully brought.[5] But, in the eighteenth century, there seems to be no

[1] Above 314 n. 12.

[2] Y.B. 27 Hy. VIII Mich. pl. 10 cited above 315 n. 4.

[3] "Jeo agre bien que chescun nuisance fait in le Roial chemin est punishable in le Leet et nemy per accion, sinon que il soit ou un home ad plus grand hurt ou incommodity, per ce que chescun home ad, et la cesty que ad plus displaisure ou hurt, peut avoir accion pur recoverer ses damages qu'il ad per reason de cest especial hurt," ibid.

[4] Co. Litt. 56*a*; cp. William's Case (1593) 5 Co. Rep. at f. 73*a*.

[5] Maynell v. Saltmarsh (1666) 1 Keble 847; Iveson v. Moore (1699) 1 Ld. Raym. 486; for the modern cases see Halsbury, Laws of England (1st ed.) xvi 159-160.

authority for the proposition that the parish could be made liable for misfeasance in an action on the case. In fact the reasoning of Vaughan, C.J., in *Thomas v. Sorrell*,[1] and of Lord Kenyon, C.J., in *Russell v. The Men of Devon*[2] seems to negative this liability; for their reasoning is based partly on the ground that the parish was not a corporate body and could own no property. It is true that the Highway Act of 1773[3] assumes that surveyors may be liable for certain misfeasances; and in the case of *Roberts v. Read*[4] damages were recovered against surveyors who, in the course of their operations in improving the highway, had let down the plaintiff's wall. There are also several instances where actions were brought against commissioners appointed under special Acts of Parliament, and against turnpike trustees. But the courts were reluctant to make such commissioners or trustees, who were generally unpaid, personally liable for acts authorized to be done by statute, even though they were done negligently.[5] They preferred to fix liability on the contractor whom these commissioners or trustees employed.[6] It was admitted, however, that they might be liable if the acts done were in excess of the authority conferred upon them by the statute, or if they had acted "arbitrarily, carelessly, or oppressively."[7] The law was in a very uncertain state. In fact, during the eighteenth and early nineteenth centuries, two causes obscured the principles applicable to this question of the liability of highway authorities to a civil action for misfeasance. First, the principles of the law as to when an employer was liable for the tortious acts of his employés, or for the acts of an independent contractor, were by no means clearly ascertained.[8] Secondly, the question whether the authorities of the local government were liable, like any other employer, for the tortious acts of their employés, was not settled. Some lawyers, including Lord Wensleydale, thought that they were not liable. He thought that they were in the same position as the heads of the departments of the central government.[9] But the better opinion was that they were liable. That was the view taken by Blackburn, J.,

[1] Above 315 n. 5.
[2] Above 315 n. 6.
[3] 13 George III c. 78 § 82.
[4] (1812) 16 East 215.
[5] Plate Glass Company v. Meredith (1792) 4 T.R. 794; Harris v. Baker (1815) 4 M. and S. 27; Hall v. Smith (1824) 2 Bing. at pp. 159-160 *per* Best C.J.; at p. 163 Best C.J. says, "from these cases I collect that no action can be maintained against a man acting gratuitously for the public, for the consequence of any act which he was authorized to do, and which, so far as he is concerned, is done with due care and attention, and that such a person is not answerable for the negligent execution of an order properly given."
[6] Jones v. Bird (1822) 5 B. and Ald. 837.
[7] Boulton v. Crowther (1824) 2 B. and C. at p. 707 *per* Abbott C.J.; Leader v. Moxton (1773) 3 Wils. 461.
[8] Vol. viii 477-480.
[9] Mersey Docks v. Gibbs (1866) L.R. 1 H. of L. at pp. 124-125.

in the masterly opinion which he gave to the House of Lords in the case of *The Mersey Docks v. Gibbs ;* [1] and that was the view which the House of Lords adopted. It followed, therefore, that highway authorities were liable like any one else to persons who had suffered damage as the result of a misfeasance committed by their employés,[2] and, in certain cases, for misfeasances committed by independent contractors employed by them.[3]

Two questions now arise. First, why was this reasoning not applied to make a highway authority liable when a person had suffered a particular damage by a non-feasance? Secondly, does this immunity from liability for a non-feasance extend to a person who is liable to repair *ratione tenurae?*

(i) The answer to the first question must be sought in the peculiar history, which I have just related, of the liability of a highway authority to be sued by a person who had suffered damage by its operations. We have seen that at first it was only extraneous wrong-doers, that is only those persons or bodies who were not under a liability to repair, who could be made liable in an action on the case.[4] There were two good reasons why such persons could not be made liable for a mere non-feasance. First, the action on the case did not, in the seventeenth century, extend to remedy mere non-feasances.[5] Secondly, when it came to be recognised that an action would lie for the neglect of a duty which caused damage to the person to whom the duty was owed, the action could only be brought if a duty to use care was proved to exist. But the only persons who were under a duty to use care in the repair of a highway, were the persons or bodies on whom the law had cast that duty. A third person who was under no such duty could only be made liable for misfeasance. We have seen that it was only gradually and with difficulty that a highway authority was made liable for misfeasance ; [6] for we have seen that various reasons, based ultimately upon public policy, had been given for negativing this liability.[7] It is not therefore surprising that, though a liability for misfeasance came to be imposed, the immunity from liability for a non-feasance remained. It is clear that that immunity is illogical. There is

[1] Mersey Docks v. Gibbs (1866) L.R. 1 H. of L. at pp. 102-121.

[2] Foreman v. Mayor of Canterbury (1871) L.R. 6 Q.B. 214. and see Blackburn J.'s remarks at pp. 217-218 ; in 1862 in the case of Young v. Davis 7 H. and N. at p. 771 Pollock C.B. had said that they were liable for misfeasance.

[3] See Hardaker v. Idle District Council [1896] 1 Q.B. 335.

[4] Above 316.

[5] For the difficulties which the court found in extending the action of assumpsit to remedy certain non-feasances in breach of a contract see vol. iii 433-441 ; for similar difficulties in extending the action of conversion to remedy cases when a person had not returned on request a chattel belonging to another see vol. vii 405-412.

[6] Above 317.

[7] Above 315.

no logical reason why a person particularly damaged by a misfeasance should be allowed to sue, and a person particularly damaged by a non-feasance should not be allowed to sue; and there is no doubt that the working of the rule has given rise to difficulties in practice, because the line between misfeasance and non-feasance is often fine. The rule in fact rests ultimately upon a false analogy to the position of a person who, being under no duty to repair, could not be guilty of a non-feasance; and it can only be justified on grounds of public policy which are by no means satisfactory.

(ii) The second question, whether this immunity from liability for a non-feasance extends to a person who is liable to repair *ratione tenurae*, is not free from doubt. This fact is due to the history of the immunity of public bodies responsible for the repair of the highways from this liability, which I have just related. In the Middle Ages, when it was held that no civil action lay either for misfeasance or non-feasance because these matters affected the public, it is clear that a person liable to repair *ratione tenurae* was no more liable to be sued in a civil action than a parish or any other body.[1] But when persons who committed misfeasances in relation to a highway were held to be liable to be sued in an action on the case, it was natural to extend this liability to persons liable to repair *ratione tenurae*. There was less difficulty in extending this liability to them, because one of the reasons given for the non-liability of the parish did not apply. We have seen that one of the reasons given for the non-liability of the parish was its lack of corporate character.[2] This reason obviously did not apply to a person liable to repair *ratione tenurae*, so that it was said that he was liable to be sued in a civil action;[3] and, as he was under a duty to repair, it was held that he was liable for non-feasance as well as misfeasance. Logically there is a good deal to be said for this view, for which there is considerable authority.[4] But there is a little authority on the other side;[5] and if, in defiance of logic, the immunity of public authorities for non-feasance is maintained on grounds of public policy, there seems to be no reason why a private person should not, on the same grounds, be given a similar immunity.

[1] Y.B. 5 Ed. IV Pasch. pl. 24, cited above 314 n. 12.

[2] Above 315.

[3] McKinnon v. Penson (1853) 8 Exch. at p. 327 *per* Pollock C.B.

[4] Thomas v. Sorrell (1674) Vaughan at p. 340; Russell v. the Men of Devon (1788) 2 T.R. at p. 670; Mayor of Lyme Regis v. Henley (1832) 3 B. and Ad. at p. 93; McKinnon v. Penson (1853) 8 Exch. at p. 327; Borough of Bathurst v. Macpherson (1879) 4 A.C. at pp. 267-269.

[5] Young v. Davis (1862) 7 H. and N. at p. 773 *per* Martin B; cp. Rundle v. Hearle [1898] 2 Q.B. at p. 88.

The stoppage and diversion of highways.

" It is an established maxim," said Byles, J.,[1] " once a highway always a highway : for the public cannot release their rights, and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are either by the old writ of *ad quod damnum*, or by proceedings before magistrates under the statute." This is a correct statement of the common law on this topic as modified by statutes, and indicates the course of the historical development of the law. It is quite clear that no private person could stop or divert a highway at his pleasure. If a private person without authority stopped or diverted a highway, and set out a new highway in its place, the old highway still continued to exist ; for the new highway

> is but at his pleasure and he may stop it when he will ; and by the laying out the subjects have not such an interest therein as that they may justify their going there ; nor is it any such way that the inhabitants are bound to watch there, or to make amends if any robbery be there committed, nor is any person liable to repair and maintain it.[2]

But though no private person could stop or divert a highway without authority, the law provided a machinery by which a stoppage or diversion could be lawfully effected. This machinery was by taking proceedings under a writ of *ad quod damnum.*

The writ of *ad quod damnum* was used in a great number of cases ;[3] but the general principle which underlay them was this : the King, having been asked to confer some favour—to grant a franchise, for instance, or a licence in mortmain—he issued this writ to ascertain whether the granting of this favour would prejudice third persons. It was in accordance with this principle that this writ was issued where an application was made to the King for leave to stop or divert a highway. The writ directed that an inquisition should be held to ascertain whether the proposed stoppage or diversion would be to the prejudice of the public. If it was found that it would not be to the prejudice of the public, the King issued his licence to stop or divert ; and it was not till the licence had been issued that the stoppage or diversion could be effected.[4]

The procedure on this writ was lengthy and expensive ; and

[1] Dawes v. Hawkins (1860) 8 C.B. N.S. at p. 858.

[2] The King v. Warde and Lyme (1633) Cro. Car. 267 ; but a person who had thus set out a new way could not bring an action of trespass against those who used it, Horne v. Widlake (1609) Yelv. 141.

[3] See F.N.B. 509-517.

[4] The King v. Warde and Lyme (1633) Cro. Car. 266 ; as Vaughan C.J. said in Thomas v. Sorrell (1674) Vaughan at p. 341, " if upon the return of an ad quod dampnum it appear to be ad dampnum vel prejudicium of no man, the King may then licence the stopping up of an ancient highway . . . for the concern is then wholly his own, but without his licence it can never be done, though a better way be set out, and so return'd upon an ad quod damnum."

it might well be that those who were most immediately affected by a proposed stoppage or diversion, had no knowledge of the proceedings, and no power to make an effective protest.[1] It is true that, when they heard of them, they might traverse the findings of the jury ;[2] but this again was a tedious and expensive process. The legislation of the eighteenth century was designed to remedy these defects in the law by providing a more convenient machinery for the stoppage and diversion of highways, greater facilities for questioning a decision to stop or divert, and a period of limitation for questioning the validity of stoppages and diversions which had already taken place. To effect the first of these objects the Legislature, by the Highway Act of 1773, gave to the justices large powers to stop, divert, and widen highways ;[3] and in 1815 it gave them further powers, and provided for the giving of public notice in newspapers of these proceedings.[4] To effect the second of these objects an Act of 1697[5] provided for an appeal to quarter sessions against the stoppage of a highway, as the result of an inquisition taken upon a writ of *ad quod damnum*. The Act of 1773 provided for an appeal to quarter sessions by persons injured by proceedings taken by the justices under the Act ;[6] and further provision for appeals was made by the Act of 1815.[7] To effect the third of those objects the Act of 1773 provided that any diversion made twelve months before the Act should be valid.[8] But this clause did not apply to stoppages or diversions effected after the passing of the Act, to which the procedure provided by the Act applied.[9]

The effect of a stoppage or diversion under the old writ, or under the authority of those statutes, was to substitute the new for the old highway, when the new highway had been completed.[10] Thus the liability of the parish to repair was transferred from the old to the new highway,[11] provided that the new highway was wholly in the same parish as the old.[12] If it was not wholly

[1] In *ex parte* Vennor (1754) 3 Atk. 766 an application was made to the court of Chancery to set aside a finding under such a writ on the ground that the proceedings thereunder were a surprise on the inhabitants of the neighbouring villages.

[2] See ibid at p. 771.

[3] 13 George III c. 78 §§ 16, 17, 19, 22.

[4] 55 George III c. 68 §§ 2-4.

[5] 8, 9 William III c. 16 ; cp. *ex parte* Vennor (1754) 3 Atk. at p. 771.

[6] 13 George III c. 78 § 19.

[7] 55 George III c. 68 § 3.

[8] 13 George III c. 78 § 19.

[9] Lord Kenyon C.J. said in Waite v. Smith (1799) 8 T.R. at p. 138 that the section was only retrospective—"if any jobs had been done before the Act passed, the Act has certainly cured them : but the Legislature did not mean to give a sanction to any jobs in future."

[10] 13 George III c. 78 § 19 ; Welch v. Nash (1807) 8 East 394.

[11] See R. v. Flecknow (1758) 1 Burr. 461 where it was held that a person who inclosed lands, and set out a new road under statutory authority, was not bound to repair the new road ; for it was said at p. 465 that the effect was the same as the setting out of a new road as the result of proceedings upon a writ of *ad quod damnum*.

[12] *Ex parte* Vennor (1754) 3 Atk. at p. 772.

in the same parish, the person who applied for issue of the writ of *ad quod damnum*, and who made the new highway through his ground, was liable to repair.[1] If a road was widened by order of the justices, and a person was liable to repair it *ratione tenurae*, he remained liable to the same extent as he was liable before.[2] Conversely, the soil of the old highway was freed from the public right of passage which formerly attached to it ;[3] and, even if the surface had formerly been vested in the highway authority by statute, it revested in the owner when the highway was stopped.[4]

In the eighteenth century we do not hear of any complaints as to the manner in which the justices exercised their powers.[5] But, at the beginning of the nineteenth century, there is reason to think that the power given to two justices by the Act of 1815, summarily to close footpaths, was sometimes abused.[6] The reason for this abuse was the growing urbanization of the country. "As the urban population increased, spreading out into the neighbouring country, we can easily imagine that many . . . footpaths, formerly unobjectionable, but now incessantly frequented by townsfolk, became serious drawbacks to the amenity of the country mansions."[7] It was remedied by the Highway Acts of 1835 and 1862,[8] under which, as amended by the Local Government Acts of 1888 and 1894,[9] the stoppage and diversion of highways are now in most cases carried out.

IV. *Bridges.*[10]

The history of the law as to the maintenance of bridges has followed the same general lines as the law as to the maintenance

[1] "But if the new road had lain in another parish, there he ought not only to have made it, but he and his heirs ought to have kept it in repair; because the inhabitants of another parish have gained no benefit from the old road being laid into Mr. Lucy's park, as they had nothing to do with the repair of it," *Ex parte* Vennor (1754) 3 Atk. at p. 772.

[2] 13 George III c. 84 § 63; R. v. Balme (1777) 2 Cowp. 648.

[3] But not from private rights of way attaching thereto, see Wells v. London, Tilbury and Southend Rly. Co. (1877) 5 C.D. 126.

[4] Rolls v. St. George the Martyr Southwark Vestry (1880) 14 C.D. 785.

[5] Webb, The Parish and the County 600.

[6] Ibid 601 where it is said that "the justices did not scruple to give away the public rights of way at the request of their neighbours; they would even go so far as to make such orders in the case of footpaths across their own estates. It became common—so it was gravely asserted in the House of Commons—for one magistrate to say to another, 'Come and dine with me: I shall expect you an hour earlier as I want to stop up a footpath'"; but this was not universally the case, and the courts of common law backed up benches who refused to lend themselves to such practices, see The King v. the Justices of Worcestershire (1818) 2 B. and Ald. 228.

[7] Webb, The Parish and the County 600.

[8] 5, 6 William IV c. 50 §§ 25, 84, 93, 113; 25, 26 Victoria c. 61 § 44.

[9] 51, 52 Victoria c. 41 § 11; 56, 57 Victoria c. 73 §§ 13, 25.

[10] The best general account of this matter is contained in Webb, The Story of the King's Highway chap. vi and the notes thereto; the eighteenth-century law is summed up in Hawkins, Pleas of the Crown bk. I c. 77; and Burn, Justice of the Peace, tit. *Bridges*.

of highways. In the mediæval period there was a similar diversity in the rules as to the liability of persons and bodies to maintain bridges. In the Tudor period the Legislature laid down a general rule as to liability for the maintenance of bridges, some twenty years earlier than it laid down a general rule as to liability for the maintenance of highways. In neither case did the Legislature abolish the older rules; but in both cases the general rule thus introduced tended to eliminate the older rules. The main difference is in the unit made liable by the Legislature. We have seen that in the case of highways the unit prima facie liable for their maintenance was the parish:[1] in the case of bridges it was the county.[2]

It would seem that at common law no person or body could be compelled to make a new bridge, unless that duty was cast upon him or it *ratione tenurae* or by prescription.[3] This principle was sanctioned by Magna Carta,[4] and was stated categorically by Coke—"none can be compelled to make new bridges where never any were before but by Act of Parliament.[5] It was not till 1888 that the making of new bridges was made "part of the common duty of any public authority; and then it was entrusted, not to any ancient body, but to the new county councils."[6] But though the making of bridges could not be compelled, it was encouraged both by the Church and by the State. The construction of a bridge was a charitable act which was rewarded by the grant of indulgences;[7] and legacies for the making and maintenance of bridges are to be found in mediæval wills.[8] Mr. Flower has pointed out that "hermits are often mentioned as bridge builders; for they built with the conviction that their work was to the glory of God and the good of their souls."[9] In this matter "the Protestants were not Reformers."[10] The repair of bridges was one of those charitable purposes set out in Elizabeth's Act of 1601,[11] which has helped to shape the modern definition of a charitable trust.[12] The efforts of the Church were

[1] Above 171. [2] Below 325, 326.

[3] For the nature of these liabilities, which were governed by the same principles as those which governed the case of highways, see above 312, 313.

[4] "Nec villa nec homo distringatur facere pontes ad riparias nisi qui ab antiquo et de jure facere debent," § 23 (1215); this is § 15 in the reissue of the Charter in 1224-1225; in Anglo-Saxon times the repair of bridges was one of the items of the trinoda or trimoda necessitas, see vol. i 19 and n. 6; but, as Professor McKechnie has said, with the prevalence of feudal tendencies this obligation "ceased to be a personal burden upon all freemen, and became a territorial burden," Magna Carta (2nd ed.) 300.

[5] Second Instit. 701.

[6] Webb, The Story of the King's Highway 85; 51, 52 Victoria c. 41 § 6.

[7] Public Works in Mediæval Law (S S.) ii xix.

[8] Ibid. [9] Ibid xx.

[10] Ibid. [11] 43 Elizabeth c. 4

[12] Vol. iv 398-399.

backed up by the King and the magnates.[1] The King would make a grant of pontage to those who were prepared to build a bridge ;[2] and the magnates sometimes built bridges,[3] and sometimes made grants of land for their construction and maintenance.[4]

But though no person could be compelled to build a bridge, unless he was bound so to do either *ratione tenurae* or by prescription, the law recognized an obligation to maintain bridges already built. As in the case of highways,[5] townships hundreds and counties might be liable,[6] as well as individuals and corporations ; and this liability might be attached to particular estates in the land.[7] The provision made for the maintenance of Rochester bridge is a typical instance of the way in which provision was made for the fulfilment of such duties in the Middle Ages. The old bridge consisted of nine piers, and the duty of repairing these piers was assigned to different persons. The Archbishop of Canterbury was bound to repair the fifth and ninth pier, the Bishop of Rochester the first, the King the fourth, Gillingham, How, and other manors the rest.[8] When the new bridge was built in 1391 by Sir Robert Knollys and Sir John de Cobham, these liabilities were continued ;[9] and the duty of superintending its maintenance was entrusted to elected bridge wardens, who were empowered to hold lands devised to them for the support of the bridge,[10] and who were later incorporated by

[1] "Sometimes church, crown, and nobility were united in their support. There is at the Record Office a bull of Boniface IX, asking alms for a stone bridge then being built by Sir Henry Percy at Berwick-on-Tweed ; for the support of an earlier bridge there an impost of 6d. on every ship entering the harbour was granted by the crown in 1347. The brothers of the hospital of St. John at Lechlade bridge, made by Isabel Ferrers in the reign of Henry III, received pontages for its repair in 1388, 1341, and 1387," Public Works in Mediæval Law (S.S.) ii xxi.

[2] For instances of such grants see R.P. i 154 (1302) ; 160 (1304) ; 165 (1304) ; 193 (1306) ; 199 (1306)—all cited by Clifford, History of Private Bill Legislation ii 26.

[3] "Alianora, widow of Henry Percy, stated, in 1315 that, as executrix of Sir Richard Arundel, she had undertaken the reconstruction of Wetherby Bridge, a work which Sir Richard had desired to complete as a benefaction," Clifford, op. cit. ii 27, citing R.P. i 340.

[4] "Stephen earl of Richmond gave St. Mary's Abbey, York, 140 acres of pasture at Ellinthorpe for the building and maintenance of a bridge across the Swale at Myton," Public Works in Mediæval Law (S.S.) ii xxi, 271.

[5] Above 310-311.

[6] For a case in which it was alleged that townships were by prescription liable to repair a bridge see The King v. Inhabitants of the County of Salop (1810) 13 East. 95 ; for a case in which a hundred was by prescription liable see The King v. Inhabitants of the Hundred of Oswestry (1817) 6 M. and S. 361 ; for the liability of counties see below 325, 326-329.

[7] "Omnes tenentes de Spaldinge debent ad reparacionem pontis illius, quilibet pro rata porcionis terrae suae contribuere, ita quod quaelibet acra erit par alterius," Rot. Hundred i 468, cited McKechnie, Magna Carta (2nd ed.) 300 n. 2.

[8] Cunningham, Industry and Commerce i 450 n. 4.

[9] Clifford, History of Private Bill Legislation ii 32-33.

[10] Ibid 33 ; Public Works in Mediæval Law (S.S.) ii xxi.

Act of Parliament.[1] There are other instances of the appointment of persons to maintain particular bridges ;[2] and it is in this respect that the law as to the maintenance of bridges differs from the law as to the maintenance of highways. The reason for this difference is obvious. It was not until the nineteenth century that road construction and maintenance came to be regarded as a work which demanded technical skill ;[3] but from the first it must have been evident that the construction and maintenance of the greater bridges were beyond the capacity of amateurs.

A new period in the history of the law as to the construction and maintenance of bridges opens with passing, in 1530-1531, of Henry VIII's statute of bridges.[4] It was quite clear that the diversity of the persons or bodies, who were bound to maintain bridges, made the law ineffective.[5] Attempts to bring home their liability to these diverse persons or bodies might easily lead to lengthy law-suits, pending which the bridge perished. It was therefore desirable to lay down a general principle of liability. The statute laid down the general principle that the county, city, or borough is liable for the maintenance of bridges ;[6] but, like other important Tudor statutes, it made no violent break with the past. In its first section it gave to any four justices of the peace in every shire, franchise, city, or borough power to proceed "against such as owen to be charged for the making or amending of bridges as the King's Justices of his Bench use commonly to do."[7] Then it went on to provide that, since it often cannot be discovered what persons or bodies were under a liability to repair, so that bridges "lie long without any amendment," the inhabitants of the county or riding were to be liable for the repair of bridges, unless they were within any city or town corporate, in which case the inhabitants of the city or town corporate were to be liable.[8] Provision was made for the levy of a rate for the repair of bridges,[9] and for the appointment of surveyors to see to the work of repair.[10] This duty of repair was extended to the repair of the highway for a length of three hundred feet from each end of the bridge.[11]

[1] Clifford, op. cit. ii 33, citing R.P. iv 149 (1421).
[2] Ibid ii 26, 31-32, 35 ; Public Works in Mediæval Law (S.S.) ii xxi.
[3] Webb, The Story of the King's Highway chap. viii.
[4] 22 Henry VIII c. 5 ; Coke Second Instit. 697.
[5] "Where in many parts of this Realm it cannot be known and proved, what hundred, riding, wapentake, city, borough, town, or parish, nor what person certain, or body politick, ought of right to make such bridges decayed, by reason whereof such decayed bridges, for lack of knowledge of such as owen to make them, for the most part lie long without any amendment," 22 Henry VIII c. 5 § 2.
[6] § 3. [7] § 1. [8] § 3. [9] § 4. [10] Ibid.
[11] § 9 ; it was provided (§§ 6 and 7) that the warden, mayors, bailiffs, and jurates of the cinque ports should exercise within their precincts the jurisdiction given elsewhere to four justices of the peace.

Coke, in his comment on this statute, asserts that the general principle of liability laid down by it was recognized by the common law ;[1] and dicta in the Year Book which he cites bear him out.[2] But it is clear that a wholly new emphasis and precision were given to the principle by the Act. Its statutory statement no doubt helped on the process which was already making for the decay of these special liabilities,[3] and for the creation of the general residuary liability of the counties and the boroughs ; and we shall see that that process was still further accentuated by the manner in which the Act, and the common law on which it was founded, were construed by the courts in the eighteenth century.[4] But for centuries to come, many of these special liabilities survived, so that it was long necessary to know something of those common law liabilities, which the first section of the statute had recognized and preserved.

Cases of the seventeenth and eighteenth centuries showed that persons or corporations might be liable to repair bridges *ratione tenurae* or by prescription ;[5] and that hundreds might be liable to repair certain bridges.[6] In 1826 the Middlesex justices said that the little bridges spanning streams, which ran across the by-roads leading from parish to parish, were generally maintained by the parish.[7] Some of the great bridges, like London and Rochester bridges, were maintained out of the profits of land given for that purpose.[8] For these reasons the burden of maintaining the county bridges was not, at the beginning of the eighteenth century, a very heavy burden :

> Right down to 1786 the Middlesex Justices maintained only three county bridges, at Brentford, Hanwell, and Chertsey respectively. Larger counties, and especially those traversed by the main thoroughfare roads, had more bridges to look after, but not many more ; and these being (south of the Trent), as Defoe informs us, for the most part built of wood, over shallow streams, the repairs required, though frequent, were, on each occasion, neither costly nor difficult of execution.[9]

But the responsibilities of the county tended to increase. In the first place, it was difficult to fix responsibility on other persons or bodies *ratione tenurae* or by prescription.[10] In the second place, the growth of commerce created new traffic which

[1] Second Instit. 700-701.

[2] Y.B. 10 Ed. III Pasch. pl. 63, when Stoutford says "per common droit pont sera leve per tout le pais, pur ce que est commun ease del pais."

[3] Above 325 n. 5. [4] Below 327-328.

[5] The Case of Langforth Bridge (1635) Cro. Car. 365 ; R. v. Inhabitants of Wiltshire (1705) 1 Salk. 359 ; R. v. Bucknall (1702) 2 Ld. Raym. 792, 804.

[6] Above 324 n. 6. Webb, The Story of the King's Highway 107-108.

[7] Webb, op. cit. 91, 108 ; for a case where the liability of the parish is alluded to see R. v. Inhabitants of Hamworth (1731) 2 Stra. 900.

[8] Webb, op. cit. 91 [9] Ibid.

[10] Above 325 n. 5 ; Webb, op. cit. 93.

made the small parish bridges quite inadequate; and, since the parish could not afford the necessary repairs, the county was obliged to come to the rescue.[1] Similarly the county was obliged to come to the rescue when a new bridge was required.[2] The counties tried to safeguard themselves from liability for the future repair of the bridges, to the building or repair of which they had made grants;[3] and it may have been with a view of preventing improvident grants being made, that a clause in an Act of 1739 prohibited the expenditure of money on the repair of bridges, till the grand jury at assizes or quarter sessions had made a presentment as to their want of repair or their insufficiency.[4]

Probably this clause had little effect in checking a practice which changing commercial and social conditions were making obviously necessary. More and better bridges were needed, and the county, because it was a larger administrative unit, was better fitted to supply them than the parish, or the hundred. It may have been a perception of this fact which led the courts in 1780, in the famous *Glusburne Case*,[5] to lay down a principle, which had the effect of transferring to the county the liability for the repair of nearly all the bridges within its limits. In that case the West Riding of Yorkshire was indicted for not repairing a bridge over the Glusburne Beck. The West Riding contended that it was not liable, because the bridge in question was a carriage bridge, which had been newly erected in 1744 by the township of Glusburne, in place of an old foot bridge, which the township of Glusburne had repaired from time immemorial. It appeared that the Riding had contributed £10 to the cost of the bridge, but had stipulated that the payment was not to be construed to make the Riding liable for its repair. It appeared also that the new bridge was a substantially different bridge from the old, being a carriage bridge and not merely a foot bridge; and that it was built sixty yards above the site of the old bridge. The court held that the Riding was liable for the cost of repair, because the county had had the benefit of the bridge.[6] There can be no doubt that this was sound law. In the first place, as early as Edward III's reign the liability of

[1] Webb, op. cit. 94-95. [2] Ibid. [3] Ibid 95.

[4] 12 George II c. 29 § 13; for the manner in which this Act was applied see Webb, op. cit. 96-98.

[5] R. v. Inhabitants of the West Riding of Yorkshire 5 Burr. 2594.

[6] "The inhabitants of Glusburne were not bound to build this new bridge for carts and carriages; nor are they obliged to repair more than they were before bound to repair; and they were never bound to repair a bridge for carts, carriages, and horses. What they were bound by prescription to repair was only a footbridge. They have built a quite different bridge in a different place. This new bridge is for the common benefit and utility of the county: and the sessions approved of it and contributed towards it," ibid at p. 2597 *per* Aston J.

the county for the repair of bridges had been based upon the benefit which all the inhabitants of the county received from them ;[1] this reasoning had been approved by Coke [2] and later lawyers ;[3] and the principle of the liability of the county had been stated and emphasized by Henry VIII's statute.[4] It followed, therefore, that if the inhabitants of the county had used and benefited by the bridge the county was liable. In the second place, it had been laid down by Coke that if a man made a bridge he was not bound to repair it, because no man is bound to repair bridges by the common law, unless he is bound thereto "*ratione tenurae* or *prescriptionis*."[5] It followed, first, that since the township of Glusburne had made a new bridge it could not be bound by prescription to repair that bridge ; and, secondly, that since the county had had the benefit of it, it was liable.

Since this decision encouraged the building of bridges, and put the liability for their repair on the unit of local government which was most able to meet it, and since it was obviously good law, it was followed in many succeeding cases.[6] In one of these cases it was held that the county was liable to repair a bridge built by turnpike trustees, because the public had benefited by it.[7] In another case the same conclusion was come to in the case of a bridge built and formerly maintained by the Crown.[8] In another case it was held that a miller who had, for his own profit deepened a ford through which the highway passed, and had erected a bridge in its place, was not liable to repair the bridge, because the public had profited by the use of the bridge.[9] The soundness of the last-mentioned decision has been questioned.[10] But the fact that the courts so decided shows that they considered that it was good policy to encourage the erection

[1] Y.B. 10 Ed. III Pasch. pl. 63. [2] Second Instit. 700-701.

[3] "Northey, Attorney-General, cited a case, wherein it was adjudged, that if a private person build a bridge, which afterwards becomes a public convenience, the county is bound to repair it," R. v. Inhabitants of Wiltshire (1705) 1 Salk. 359.

[4] Above 325.

[5] "If a man make a bridge for the common good of all the subjects, he is not bound to repair it ; for no particular man is bound to reparation of bridges by the common law, but *ratione tenurae* or *praescriptionis*," Second Instit. 701; Coke cites for this Y.B. 8 Hy. VII Mich. pl. 2, which does not specifically deal with the case where a man had made a bridge ; it says : "et si pont soit, cestuy que est prochein adjoinant n'est tenu de common droit a reparer le pont, comment que le pont ad este la de tout temps, sinon que il ad issint fait per prescription, et ceux queux estat il ad etc."

[6] See Burn, Justice of the Peace (ed. 1820), tit. *Bridges* 368-375.

[7] The King v. Inhabitants of the West Riding of Yorkshire (1802) 2 East. 342.

[8] The King v. Inhabitants of Bucks (1810) 12 East. 192.

[9] The King v. Inhabitants of Kent (1814) 2 M. and S. 513.

[10] The Queen v. the Isle of Ely (1850) 15 Q.B. 827 at pp. 842-843 ; probably the decision can only be supported by the fact that the ford had always been dangerous, so that the county had the benefit of a more convenient passage ; see The King v. Kerrison (1815) 3 M. and S. at p. 532 *per* Bayley J. ; below 330.

of bridges. That they were right in so thinking is proved by the fact that the Legislature was of the same opinion. Just as the mediæval Kings made grants of pontage to the builders of bridges,[1] so the eighteenth-century Parliaments passed Acts empowering persons or bodies of persons to build bridges, and take tolls from those who used them.[2] On the other hand, it is not surprising that the county authorities objected to the great increase of these liabilities which followed upon these decisions. In 1799 Staffordshire and Lancashire tried to induce Parliament to enact that no bridge should be a county bridge unless built with the assent of the justices.[3] But Parliament wisely refused to discourage the bridge builders. It did however provide in 1803 that a bridge should not become repairable by the county, unless it was constructed in a substantial commodious manner, under the direction or to the satisfaction of the county surveyor, who must superintend the erection of the bridge if requested to do so by the persons erecting the same ;[4] and another safeguard was provided by the common law rule that the erection of a wholly useless and inadequate bridge in a highway is an indictable nuisance.[5]

Thus the liability for the repair of most of the public bridges has come to rest upon the county. But that liability is not quite universal. In addition to the cases where an individual is liable to repair *ratione tenurae*, or where a corporation or some other body of persons is liable to repair by prescription, there are other cases in which the liability of the county can be negatived.

In the first place, the structure must be a public bridge ;[6] and in indictments for non-repair it is described as " *pons publicus et communis situs in alta regia via super flumen seu cursum aquae,*"[7] or, as Lord Tenterden, paraphrasing these words, said, a bridge over " water flowing in a channel between banks more or less defined, although such channel may occasionally dry."[8] Thus

[1] Above 324.

[2] Webb, The Story of the King's Highway 129, 154.

[3] Ibid 100-101. [4] 43 George III c. 59 § 5.

[5] " It is not enough that a new bridge shall be built in a highway used by the public ; it must also be useful to the public. . . . I do not lay stress on the idea of the public having adopted the bridge, by passengers going over it ; because if it occupy the highway, they cannot help using it. I only rely on the using of it so far as to show that it does not appear to have been treated as a nuisance, but to have been acquiesced in by the public. If, however, it be built in a slight or incommodious manner, no person can, at his choice, impose such a burden on the county, and it may be treated altogether as a nuisance, and indicted as such," R. v. Inhabitants of the West Riding of Yorkshire (1802) 2 East. at p. 348 *per* Lord Ellenborough C.J.

[6] " This extendeth only to common bridges in the King's high-waies, where all the King's liege people have, or may have passage, and not to private bridges to mills or the like," Coke, Second Institut. 701.

[7] Ibid.

[8] The King v. Inhabitants of Oxfordshire (1830) 1 B. and Ad at p. 301.

a series of arches or culverts under a raised causeway, along which the highway ran, constructed to carry off flood water, was not a bridge which the county was liable to repair ; [1] nor were bridges over a dry ravine or over another highway.[2]

In the second place, a bridge built solely for the advantage of a private person or corporation, is not a *pons publicus et communis*, which the county is liable to repair. Thus Rolle says :

> If a man erect a mill for his own profit, and make a new cut for the water to come to it, and make a new bridge over it, and the subjects use to go over this as over a common bridge, this bridge ought to be repaired by him who has the mill, and not by the county, because he erected it for his own benefit.

Rolle adds that this was adjudged against the Prior of Stratford in 1315 by the King's Bench in the cases of Bow bridge and Channel bridge, and that these bridges were now repaired by the City of London who were the owners of the mill.[3] This statement of the law, though it was in substantial agreement with Coke's statement,[4] was questioned by Lord Ellenborough, C.J., in *The King v. the Inhabitants of the County of Kent ;* [5] but, it was approved, and the authority of the last cited case was questioned, by Patterson, J., in *The Queen v. the Isle of Ely.*[6] His reasoning is historically sound ; for it is in agreement with the opinion of Coke and Rolle, and is substantially similar to the reasoning of the Year Book case of 1337.[7] This case and the case of *R. v. Kerrison* [8] show that if a bridge is constructed by a person or corporation for their own purposes, that person or corporation is liable to repair, though the public use the bridge. If in such cases a cut is made in the highway, and a

[1] The King v. Inhabitants of Oxfordshire (1830) 1 B. and Ad. 289.

[2] Ibid at p. 301 ; in Bridges and Nichol's Case (1624) Godbolt 346, there cited, an indictment was quashed because, *inter alia*, it did not allege that " the bridge was over a water."

[3] " Si home erect un molyn pur son singular profit, et fait un novell cut pur le ewe a vener al ceo, et fait un novell Bridge ouster ceo, et les subjects use d'aller ouster ceo come ouster un common Bridge, cest Bridge doit estre repaire per cestuy qui ad le molyn, et nemy le Countie, pur ceo que il ceo erect pur son benefit demesne. 8 *Ed.* 2 B.R. adjudge pur *Bow Bridge* et *Channel Bridge* vers le *Prior de Stratford*, et ceo ore repaire per *London* que ad le molyn," Ab. tit. *Bridges* 2.

[4] Above 329 n. 6.

[5] (1814) 2 M. and S. at p. 519 ; Lord Ellenborough C.J. seems to have ignored the fact that Rolle's statement is in substantial agreement with Coke's statement.

[6] (1850) 15 Q.B. at pp. 842-843.

[7] Stoutford had argued that, if a bridge was " for the common ease " of the county, the county must repair, and not the man who had voluntarily built it ; to this Aldeburgh J. said, " vous avez touche un chose que vous quidez etre pur vous, quel nous prenoms plee contre vous, et ce est, pur ceo que vous dites qu'il est trove que vous avez leve pur votre ease : car quant le cause est, que tout le pais doit un pont repareller pur leur common ease, *Sic hic* quant la pont est plus a votre ease plus que a touts les auters," Y.B. 10 Ed. III Pasch. pl. 63.

[8] (1815) 3 M. and S. 526.

bridge is built over the cut, " the public are no gainers by the change." [1] The construction of the bridge, though authorized, is for the benefit of those who constructed it, and its continuance is therefore conditional on its being kept in repair by those for whose benefit it was constructed. As soon as the condition is broken " the indefeasible rights of the public revive, and the cut becomes a nuisance." [2] Whether a bridge constructed by a private person or a corporation is of such utility to the public, that the county becomes liable to repair it, or whether, though of some use to the public, it is primarily beneficial to the person or corporation who constructed it, so that that person or corporation is liable to repair it, are questions of fact for the jury, to be decided in each case upon a consideration of the amount and character of the user.[3]

In the third place, the fact that the bridge, though it abuts on a highway is not part of an existing highway, but is erected on land belonging to the person who has built it, raises a presumption, though not an irrebutable presumption, that it is built primarily for the benefit of the builder, and that he is therefore liable for its repair.[4]

County bridges are now repairable by the county council ; [5] but if erected after June 24, 1803, by a private person or by bodies of persons, they are not county bridges, unless erected to the satisfaction or under the supervision of the county surveyor.[6] Moreover, the liability of persons, corporations, or other units of

[1] The Queen v. the Isle of Ely (1850) 15 Q.B. at p. 844.

[2] Ibid at p. 844.

[3] " I do not stay to enquire whether my brother Stephen at the first trial intended to lay it down as a legal proposition that, granting the building of a bridge by a private person, and that the bridge when built is of utility to, and is used by, the public, those facts would be conclusive against the county on the question of its liability to repair; the learned judge is understood so to have laid down the law, and if he did so, we are of opinion that his view was not correct. . . . If on the other hand the learned judges in the Divisional Court really did say that, granting the same premises, there must in addition to evidence of public user and public utility be some proof of an overt act amounting to a formal adoption by a body capable of representing and binding the county, then we think that their judgment cannot in its breadth be maintained. . . . In all these cases, therefore, the question is one of evidence for the jury. Utility is but one element to be considered in determining the question of liability, and it is for the jury to say in each particular case whether the amount of utility is sufficient to satisfy that element, and further whether the amount and character of the user are sufficient to transfer to the county the burden of repair," The Queen v. Inhabitants of County of Southampton (1887) 19 Q.B.D. at pp. 600-601 *per* Lord Coleridge C.J. ; the view here expressed that the question is essentially one for the jury agrees with Y.B. 10 Ed. III Pasch. pl. 63 where it is said " que pais puit en ceo case scaver la chose per case dehors, cestascavoir que il ad molyn, et pur easement del chymin als moleyn ils ont leve, et issint ad pais cause de scavoir et conustre qu'il doit ou non."

[4] The Queen v. Inhabitants of the County of Southampton (1887) 19 Q.B.D. at pp. 601-602 ; cp. The Queen v. the Inhabitants of the County of Southampton (1886) 17 Q.B.D. at pp. 435-437.

[5] 51, 52 Victoria c. 41 § 3 (viii).

[6] 43 George III c. 59 § 5 ; above 329.

the local government to repair *ratione tenurae* or by prescription, the liability of other highway authorities to repair bridges which are part of the highway, and the liability of persons or corporations to repair bridges which they have erected for their own benefit, still remain.

We have seen that the inter-relation of the units of local government, and their relation to the Executive, the Legislature, and the Courts, indicates the real sense in which it is true to say that there was a separation of powers in the eighteenth-century constitution.[1] Similarly, the growth of these special bodies of law is a striking illustration of the far-reaching effects of that rule of law, which the Great Rebellion and the Revolution had made the most fundamental characteristic of the British constitution. We shall see that, in the sphere of central government, the growth of the modern system of cabinet government has, to a large extent, destroyed that separation of powers which characterized the eighteenth-century constitution ; [2] but that it still, to some extent, exists in the independent position retained by the courts.[3] Also it still to some extent exists in the independent position which the units of the new machinery of local government have inherited from their predecessors. Fortunately very much more is left of that rule of law which the eighteenth-century lawyers had inherited and perfected. Though in the sphere of central government the statutory powers given to officials and departments have made some encroachments upon it, yet it remains to a large extent intact ; and both the control of the courts over the activities of the different units of local government,[4] and the existence of these special bodies of law, the beginnings of which I have described, show that in the sphere of local government it is all-pervading.

I must now endeavour to sum up the strong and weak points of this eighteenth-century system of local government.

The Strong and Weak Points in the Eighteenth-Century System of Local Government

The eighteenth-century system of local government had many strong points.

In the first place, it safeguarded the rights and liberties which the law gave both to individuals and to the units of local government. Both individuals and the units of local government had abundant remedies, civil and criminal, if their rights and liberties

[1] Above 254-256.
[2] Below 643, 722-724.
[3] Below 417, 646.
[4] Above 155-158, 243-254.

were infringed ; [1] and thus a spirit of independence was fostered in individual citizens, and the autonomy of the units of local government was preserved. But it should be noted that what the law thus safeguarded was not liberty in general, but particular rights and liberties. This was then, and always has been, the attitude of the common law.[2] No doubt some rights and liberties, such as the right to personal freedom and the right to protection against attacks upon person or property, were common to all citizens ; but other liberties, such as the right to vote for members of Parliament, the right to be appointed to the office of justice of the peace, the right to become a mayor or other official or member of a municipal corporation, could only be enjoyed by certain classes of persons. There were degrees and grades in the rights and liberties of individuals ; and there were degrees and grades in the rights and liberties of the units of local government. Vestries, petty sessions, quarter sessions, municipal corporations, had different rights and liberties, which gave them various degrees of autonomy—degrees of autonomy which were often different in different places. The various units of local government had, it is true, a family likeness to one another ; and the pressure of a common law made for a certain measure of uniformity. But no eighteenth-century statesman ever supposed that the attainment of a standardized uniformity was a possible or a desirable ideal. It was seen that, just as between individuals it is impossible to produce an absolute equality, so as between the higher and lower units of local government, and as between these units in different environments, there must be variety in structure and function. Differences between individuals, and varieties in the units of local government, which were imposed by natural causes, were accepted as inevitable, and were therefore reflected in the different contents of the rights and liberties which the law gave to these individuals and to these units of local government. It was recognized, perhaps half unconsciously, that equality and liberty are not necessary concomitants ; and that attempts to produce an absolute and necessarily fictitious equality and uniformity, are fatal both to an ordered liberty, and to national fraternity. The eighteenth-century system of local government helped to preserve those definite yet flexible class distinctions which had emerged in the sixteenth century,[3] because those class

[1] Above 157, 158, 246-248, 250-251, 253.

[2] "If it be allowable to apply the formulas of logic to questions of law, the difference in this matter between the constitution of Belgium and the English constitution may be described by the statement that in Belgium individual rights are deductions drawn from the principles of the constitution, whilst in England the so-called principles of the constitution are inductions or generalisations based upon particular decisions pronounced by the Courts as to the rights of given individuals," Dicey Law of the Constitution (7th ed.) 193.

[3] Vol. iv 402-407

distinctions were reflected in its organization, and because the different rights and liberties of each of these classes were recognized and protected by the law.

In the second place, the eighteenth-century system of local government, though it protected rights and liberties, stressed the duties of citizens rather than their rights. From all sorts and conditions of men—from the lord lieutenant and the justices of the peace [1] to the labourer bound to perform his "statute labour" on the roads [2]—the law exacted gratuitous service. Different classes of citizens were called on from time to time to serve on juries of many different kinds, to serve as surveyors of highways, as constables, as churchwardens, as overseers of the poor, to take parish apprentices.[3] These different classes of citizens, who were thus compelled to serve the state in these different capacities, received a practical education in the duties of citizenship appropriate to their station. Bagehot, speaking of the higher classes of eighteenth-century society, truly says that "in all the records of the eighteenth century the tonic of business is seen to combat the relaxing effects of habitual luxury." [4] Similarly, in the lower classes of that society, the duty imposed upon them to serve the state, took those on whom the duty was placed out of the rut of their daily work, and gave them sometimes the rudiments of a political education, and always the reminder that there were public duties involved in citizenship, which must be fulfilled. What De Tocqueville has said of the educational effects of the jury system [5] applies also to many of those compulsory and unpaid duties in the system of local government, which were exacted from citizens in the eighteenth century.

In the third place, because the system of local government depended upon bodies and officials which were autonomous within their own spheres, because these bodies and officials were educated by the performance of the duties imposed on them by the law, they were able to appreciate the consequences of a foolish policy or a neglect of duty. In these small autonomous and separate units the consequences of folly or neglect were immediately apparent; and it was comparatively easy to put the blame on the right shoulders. There was no paid staff of bureaucrats in the service of the local authorities to warn them against the consequences of a mistaken policy, and there was no department of the central government to advise or control. The local authorities were obliged to shoulder responsibility for their neglects and defaults. Thus the qualities of initiative and readiness to learn

[1] Above 153-154. [2] Above 154-155.

[3] 8, 9 William III c. 30 § 5; Webb, Local Government, The Old Poor Law 207 and n. 3.

[4] Literary Studies i 241.

[5] Démocratie en Amerique ii 190, cited vol. i 349.

from experience were fostered. As a locality suffered from the folly and neglect of its rulers, so it profited by their ability and industry. We have seen that many public-spirited administrators in many different places devoted many years to the work of improving the standard of government in their districts.[1] Their example was not wasted upon their fellow administrators, who were the better able to judge a policy by its results, because they did not gain office by means of promises to pursue policies, adopted without consideration, because those policies were likely to captivate an ignorant electorate.

In the fourth place, the fact that there were great varieties in the constitution of the various units of local government, enabled the public opinion of the country to come to some fairly definite conclusions as to the methods of administration which were the most effective. On the one hand, the examples of administration by a turbulent open vestry,[2] and the conduct of the trading justices in the City of London ;[3] on the other hand, the examples of a vestry like St. George's Hanover Square which was controlled by noblemen and gentlemen,[4] and of the close corporation of Liverpool[5]—showed that the government was most successfully run when it was in the hands of the higher and most enlightened classes. This appeared to be an obvious truism in the eighteenth century ; for it was not a century which was blinded by the universal prevalence of democratic theories. The result was that there was a general acquiescence in the rule of the landed gentry in the country, and in the rule of the more substantial traders in the towns. The most important parts of the work of local government were thus entrusted to a ruling class responsible to itself. And, because it was in the hands of a class of this type, it was possible to modify the machinery of local government and to adapt it to new needs, by means of extra-legal conventions.[6] A class which had progressed so far as this in the art of self-government, had learned all that was necessary to fit it to manage and to adapt to changing needs the complex constitutional machinery of the English state. To the political abilities of this class, which were created and fostered by the eighteenth-century system of local government, is due the success of Parliamentary government in England. At the same time, though the control of the local government was in the hands of a ruling class, some share in the government was left to the other classes who were called upon to serve on juries and to fill the lower offices in that

[1] Above 145-146.
[2] Above 139.
[3] Above 143.
[4] Above 143.
[5] Webb, Local Government, The Manor and the Borough 481-491
[6] Above 220-235.

government. Just as the classes of society were graded, so were the degrees of political power and responsibility.

Lastly, the system of local government was a cheap government. Those who have been trained to manage small estates, or to live upon moderate incomes, are the persons who understand the need for thrift and economy; and the class who managed the local government of the country fell, for the most part, into these categories. Moreover they were the class upon whom the burden of the rates mainly fell. Administrators who come either from a small rich class or from the class of the poor, will be extravagant because, for opposite reasons, neither appreciates the value of money or the necessity for economy. The fact that the eighteenth-century system of local government was a cheap government meant that no impediment was placed upon that economic expansion which, at the end of the century, the growth of the overseas dominions of the Crown, and scientific and mechanical inventions were producing.

The eighteenth-century system of local government had the defects of its qualities. Its weak points can be grouped under three heads.

In the first place, there was too little central control over the units of local government—their autonomy was excessive. It was a mistake to leave the entire control of matters of such national interest as main roads, and the management of the poor and prisons, to the unfettered discretion of small, often very small, units. The Legislature, it is true, passed many general Acts in order to bring the law into conformity with modern needs; and on the basis of this legislation, and the principles of the common law, the common law courts built up important bodies of local government law. But, though this legislation did something to bring the law into conformity with modern needs, it was not wholly successful, because, in many cases, the agencies trusted to work this legislation were defective. It was of little use to direct overburdened officials, working with inadequate machinery, to perform new duties; and, even if the machinery had been more adequate, it was futile to expect that they would perform them without any sort of supervision.[1]

In the second place, though the old machinery sufficed fairly well for backward rural areas, where life ran on in the accustomed ways, it was obviously insufficient for the needs of growing towns and suburban districts. The industrial revolution was causing the rapid growth of these urban and suburban centres; and the old machinery was incapable of solving the new problems of government which were arising in these centres.[2] The Legislature adopted the only expedient which the autonomy

[1] Above 176, 183, 214. [2] Above 214-215.

of the units of local government left open to it—the expedient of creating *ad hoc* authorities. At the request of many districts it passed hundreds of Acts creating *ad hoc* authorities for various purposes.[1] Though the powers conferred on these *ad hoc* authorities foreshadow later developments in local government, notably developments in municipal government,[2] they were partial and purely local in their operation ; and they immensely complicated an already complicated system. They left the existing machinery untouched ; and so they often raised difficulties, for instance in the case of the turnpike trusts, as to the relation of the old machinery to the new statutory machinery.[3]

In the third place, though the cheapness of the system of local government had its good side—a side which we, who live in an age when all parties in the state compete in extravagance, are the more disposed to admire—it also had its bad side. Essential services, such as the building and maintenance of roads, bridges, and prisons, were inadequately performed because not sufficient money was spent on them. Too great reliance was placed on unpaid and compulsory service or, if that failed, on the services of a contractor.[4] Too great reluctance was shown to pay adequately for competent service.[5] And this policy often, in the long run, made for extravagance, corruption, and illicit exactions. It was impossible to compel the autonomous units of local government to raise the money needed to perform adequately the duties laid upon them by the law, or, in the case of urban and suburban districts, to undertake the new duties of police, of cleansing, of lighting, and of sanitation, which were urgently required. This was another reason why it was necessary to employ the device of the creation of an *ad hoc* authority. It was possible to create an *ad hoc* body with power to rate or to charge money for its services. We have seen that the device of levying a toll on the users of the roads was the only way in which the sums requisite for road making and repair could have been raised.[6]

In the latter half of the eighteenth century it was becoming clear that what was needed was a comprehensive overhauling of the machinery of local government—an overhauling as comprehensive as that effected by the Tudor legislation.[7] Possibly something of the kind, in, at any rate, some of the departments of local government, might have been attempted by the younger Pitt, if the war with France and the passions engendered by the French Revolution had not intervened.[8] But such a task would have been difficult. It would have been difficult to persuade

[1] Above 216.
[2] Above 215.
[3] Above 208-209.
[4] Above 177.
[5] Above 210, 231, 232-233.
[6] Above 210.
[7] Vol. iv 137-166.
[8] Above 124-125.

the governing class that comprehensive measures of reform were necessary or expedient. Even if this difficulty had been overcome, the making of the necessary reforms would have been a delicate task, because all classes would have feared to disturb the existing equilibrium of powers and forces in the constitution. Parliament would have been reluctant to give departments of the central government larger powers of supervision or control, because that would have meant an increase in the power and influence of the Crown. The Crown, the peers, and the large landowners would have been opposed to changes in the machinery of government in the counties and the boroughs which might have had the effect of diminishing their electoral influence.[1] The justices of the peace, whose representatives were all powerful in the House of Commons,[2] would have opposed measures which diminished their autonomous powers to rule their counties ; and the borough corporations would have opposed changes which aimed at thoroughgoing municipal reforms.[3] Pitt might have made some reforms, but it is difficult to see how any really comprehensive measure of reform could have been got through the unreformed Parliament.

At all periods in English history it is necessary to understand the characteristic features in the system of local government, if we would understand the causes of the form assumed by the public law of the state, of the manner of its working, and of the way in which it developed.[4] This is more especially true in the eighteenth century. The smooth working of the complex constitution in which King, Lords, Commons, and the Courts all played their separate parts, depended to a large extent upon the use which the King, and the ruling class of peers, large landowners, and great merchants, made of this intricate system of local government ; and, conversely, some of the salient features of this intricate system of local government depended upon the relative powers and position in the state of the King and the central government, of the Houses of Lords and Commons, and of the Courts. The rival forces and powers which kept the complicated machinery of the eighteenth-century constitution in motion, were so delicately adjusted,[5] that Burke was fully justified in warning the average citizen that he ought " to understand it according to his measure, and to venerate when he was

[1] For this electoral influence, the manner of its working, and its constitutional importance, see below 556-563, 577-578, 630, 632-635.

[2] Above 241-242 ; below 558-559. [3] Below 574-576.

[4] Vol. ii 404-405 ; vol. iv 163-166, 180-181 ; vol. vi 58-66.

[5] Horace Walpole, Letters (ed. Toynbee) xiv 333 said, " another of my tenets is this . . . ; the excellence of our constitution consists in the balance of the three powers. Unfortunately it is the nature of a balance to fluctuate by a breath of air."

not able presently to comprehend." [1] The ensuing sections of this chapter will show that it is impossible to understand it in any adequate measure without a knowledge of the salient features of the system of local government on which it rested.

III

The Executive

The principal motive force of the executive power in the British Constitution has always been the royal prerogative. This is as true to-day as it was in the eighteenth century. But whereas in the eighteenth century the powers of the executive were almost entirely derived from the royal prerogative, and only to a comparatively small extent from statutes which gave additional powers to the King or his ministers, to-day the powers derived from the royal prerogative are supplemented by a maze of statutory powers, given sometimes to the King and more often to his ministers, which are not only of an executive, but also of a judicial and a legislative character. In the eighteenth century the most important statutes affecting the prerogative were those great constitutional statutes of the seventeenth century, which had settled, in the sense contended for by Parliament, the controversies of that century; [2] and, apart from temporary statutes passed to meet some emergency,[3] there are comparatively few statutes which give additional powers to the King or his ministers.[4] Therefore, in describing the executive government of the eighteenth century, I must, in the first place, say something of the royal prerogative. The royal prerogative is, in legal theory, wielded by the King as the head and representative of the state. Therefore, from an early period in English history, much law has been evolved by the courts or enacted by the Legislature as to the succession to the throne; as to the measures to be taken in the event of a minority or of the mental incapacity of the King or in the event of his absence from the realm; and as to the royal family. I shall, in the second place, say something of the development of the law upon these

[1] Appeal from the New to the Old Whigs, Works (Bohn's ed.) iii 114, cited vol. xi 278.

[2] For these statutes see vol. v 449-454; vol. vi 112-113, 230-243, 260-262; vol. ix 117-119.

[3] For instance Acts which in 1715, 1722, and 1745 suspended the Habeas Corpus Act, Erskine May, Constitutional History iii 11-12; and an Act of 1777, 17 George III c. 9, which gave the Crown power to arrest persons suspected of high treason in America or on the high seas, or of piracy.

[4] Perhaps the most important of these statutes was the Riot Act of 1714, 8 George I St. 2 c. 5; vol. viii 320, 328-329; below 705-706.

matters.[1] But, though the royal prerogative is, in legal theory, wielded by the King, the extent to which he has actually exercised different parts of his prerogative has varied enormously at different periods in the history of English law; and, at all times, he has been obliged, sometimes by statute, and sometimes by physical necessity, to exercise his prerogative through the agency of ministers and departments of state. In the third place, therefore, I shall deal shortly with some of the agencies through which the royal prerogative has been exercised—the privy council and its committees, the ministers and their offices, and other boards, committees, or commissions.[2]

The Royal Prerogative

The royal prerogative is the oldest part of the constitution; and, in the preceding volumes, I have given some account of its evolution.[3] We have seen that, at the beginning of the eighteenth century, it had, without ceasing to possess those privileges of feudal or semi-feudal origin which had been its principal content in the Middle Ages, acquired a large and indefinite range of powers, which fitted it to supply the executive power in a modern state; and that, consequently, the King had got his modern position of the representative of the state, and the visible and intelligible embodiment of the unity of Great Britain and her Dominions beyond the seas. But we have seen that, though the speculations of the Tudor and early Stuart lawyers had converted the very human mediæval King into a corporation sole, immortal, omni-present, and infallible, the result of the constitutional controversies of the seventeenth century had been to prove that the prerogative of this immortal and infallible King was not the sovereign power in the state, and that, though the King was personally above the law, his prerogative was subject to it. As the result of this historical development, the prerogative had become the centre of a large and complex body of law, which bore on it the marks of legal concepts and theories, and of constitutional developments and controversies, from all periods in the history of English law.

The main features of this body of law were summarized by Blackstone with that mixture of accuracy and literary skill which is characteristic of his work. But his account is only a sketch; and it fails to take account of the manner in which, even when he was writing, some parts of the prerogative were being enlarged, others curtailed, and others rendered more

[1] Below 425-453. [2] Below 453-525.

[3] Vol. iii 458-469; vol. iv 199-208; vol. vi 20-23, 68-71, 203-208, 230-231, 242-243, 258-262; vol. ix 4-7

precise. His sketch is necessarily an historical sketch; for his Commentaries are primarily a book for students; and, even to-day, a teacher who wishes to give an account of the prerogative and its place in the constitution, must adopt this method of approach. For these reasons it sometimes stresses the past rather than the present. It stresses the process of development rather than the law as it stood when Blackstone was writing; and therefore it fails to indicate the directions in which the law was even then tending to develop. In spite of these shortcomings, Blackstone's summary is by far the best account of the position of the prerogative in the public law of the eighteenth century; and, therefore, like his summaries of other branches of the law, it affords an excellent starting-point for an historical account of the modern developments of the law. I shall therefore give a summary of, and a comment upon, Blackstone's general description of the prerogative which is contained in chapter seven of his first Book,[1] and a summary of, and a comment upon, his more detailed descriptions of particular prerogatives, which are contained in other parts of the Commentaries. In the last chapter of this history I shall show how the principles set forth by Blackstone were developed in the last decade of the eighteenth and in the nineteenth centuries.

Blackstone defines prerogative as "that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity." [2] In the earlier part of the seventeenth century Finch had defined it as that law in case of the King which is law in no case of the subject.[3] Blackstone's definition is the better of the two because, while Finch's definition looks backward to the mediæval conception of the prerogative which is stressed in the Prerogativa Regis [4] and Staunforde's commentary thereon,[5] Blackstone's takes account of those sixteenth- and seventeenth-century developments, which had made the King the head and representative of a modern state, and his prerogative the source of that state's executive power. Finch, it is true, took some account of these later developments; [6] and, as I have said, Blackstone owed something to his book; [7] but he laid more

[1] Comm. i 237-280. [2] Comm. i 239.

[3] "The king's prerogative stretcheth not to the doing of any wrong; for it groweth wholly from the reason of the common law, and is as it were a finger of that hand, although so much differing in fashion (as the head and the body can never be of one proportion) that if you set them in parallels together, you shall find it to be law almost in every case of the King, that is law in no case of the subject," Law (ed. 1759) 85; for Finch's book see vol. v 399-401.

[4] For this so-called statute see vol. i 473 n. 8; vol. ii 223 n. 1; vol. iii 460.

[5] For Staunforde's book see vol. iii 460.

[6] Op. cit. 81-83. [7] Vol. v 400-401.

stress than Blackstone lays upon the mediæval conception, and grounded his definition upon it.[1]

Blackstone then divides the prerogatives of the King into the two classes of direct and incidental. The former are the prerogatives which make the King an immortal and an impeccable corporation sole, give him his position as head and representative of the state, and invest him with the powers of the executive government. The latter consist, for the most part, of various advantages, procedural and otherwise, enjoyed by the Crown—"exceptions, in favour of the Crown, to those general rules that are established for the rest of the community."[2] The former represent, for the most part, the contribution of the sixteenth and seventeenth centuries: the latter, the mediæval ideas, which have, in many cases, become the centre of very technical bodies of law.[3] With these incidental prerogatives may be classed various proprietary and fiscal rights of the Crown, which, like them, are, for the most part, mediæval. Blackstone describes these proprietary and fiscal rights in chapter eight of his first Book which deals with the subject of the King's revenue.[4] But most of these rights are in their origin and nature akin to the incidental prerogatives of the King, and fall more properly under this head. I shall deal first with the incidental prerogatives, including under this head these fiscal and proprietary rights, and secondly with the direct prerogatives.

(1) *The incidental prerogatives.*

These prerogatives can be classified as a series of rights and privileges which are either (i) procedural, or (ii) fiscal or proprietary, or (iii) quasi-fiscal or quasi-proprietary. I shall deal with these prerogatives under these three heads, and then I shall say something of certain limitations upon their exercise prescribed by the law. We shall see that some of these limitations are important because when, as the result of the constitutional controversies of the seventeenth century, all parts of the prerogative, direct as well as incidental, were subjected to the control of the law, the principles underlying some of these limitations were extended, and acquired a new constitutional significance.[5]

(i) *Procedural privileges.*

Blackstone passes lightly over these procedural privileges in his first Book; but he gives us fuller information in the seventeenth chapter of his third Book.[6] We have seen that, by the

[1] Above 341 n. 3. [2] Comm. i 239-240. [3] Below 343-345, 352-357, 358.
[4] Comm. i 281-306. [5] Below 359-361 [6] Comm. iii 254-265.

seventeenth century, the law had, to use Bacon's picturesque phrase " woven a garland of prerogatives around the pleadings and proceedings of the King's suits." [1] We have seen that one of the most important of these procedural privileges was the rule that the King could not be sued in his courts ; and that the evolution of various remedies, by which the subject could get redress against the Crown, had given rise to a complex body of law, which has been very incompletely adapted by statutes of the nineteenth century to the needs of the citizens of the modern state.[2]

Conversely, the King has always had and still has many procedural privileges when he appears as plaintiff in his courts.

In the first place, not only can the King make use of nearly all the actions open to the subject, and bring them in what court he pleases, but he has also other remedies which are, as Blackstone says, " much easier and more effectual." [3] Amongst these more effectual remedies the following are perhaps the most conspicuous : (*a*) *The inquisition* or *inquest of office*—an enquiry made by a sheriff, coroner, escheator, or other royal officer *virtute officii*, or by virtue of a special writ, to enquire into any matter which entitles the King to the possession of lands, goods or chattels.[4] We have seen that it was from the procedure to traverse these inquests of office that the remedies against the Crown known as *monstrans de droit* and *traverses of office* originated.[5] The abolition of the military tenures and their incidents diminished the occasions for the employment of this remedy ; but in Blackstone's day there were still several occasions upon which it was necessary to employ it. In the case of land it was employed,

> to enquire whether the king's tenant for life died seised, whereby the reversion accrues to the king : whether A, who held immediately of the crown, died without heirs ; in which case the lands belong to the king by escheat : whether B be attainted of treason ; whereby his estate is forfeited to the crown : whether C, who has purchased lands, be an alien ; which is another cause of forfeiture : whether D be an idiot *a nativitate ;* and therefore together with his lands, appertains to the custody of the king.[6]

In the case of chattels it was employed " in case of wreck, treasure trove, and the like, and especially as to forfeitures for offences." [7] Modern legislation has still further diminished the

[1] Works (ed. Spedding) vii 693, cited vol. ix 7 n. 4.

[2] Vol. ix 7-45.

[3] Comm. iii 257-258 ; there were certain actions which were not open to him—" as the king, by reason of his legal ubiquity cannot be disseised or dispossessed of any real property which is once vested in him, he can maintain no action which supposes a dispossession of the plaintiff, such as an assize or an ejectment, ibid 257 ; Chitty, Prerogatives of the Crown, 245 ; Anon. (1793) 1 Anstr. at p. 215 ; cp. Robertson, Civil Proceedings by and against the Crown 2 176-177.

[4] Bl. Comm. iii 258-259

[5] Vol. ix 24-26.

[6] Comm. iii 258.

[7] Ibid 259.

occasions for its employment. Before 1925 it was chiefly employed in cases where land had escheated to the Crown;[1] and though the procedure upon it was improved in 1887,[2] it still retained many of its archaic features.[3] The abolition of escheat has taken away the chief occasion for its use. (*b*) By the writ of *scire facias* the Crown could repeal grants either if they were unadvisedly made, or if the grantee had done an act which amounted to a forfeiture.[4] (*c*) The most general of these remedies is the *information*. It is the general remedy to recover money or chattels, or to obtain damages for wrongs committed against the property of the Crown.[5] Informations were either Latin Informations, brought to assert some legal right in the court of Exchequer;[6] or English Informations, brought to assert some equitable right either in the court of Exchequer or in the court of Chancery.[7] The former were and are much the more common, and they are the only ones described by Blackstone. They were and are *in rem* when the Crown claims a declaration that it is entitled to property which is in the hands of its officers, e.g. if treasure trove has been seized by the King's officer for his use; or when he is claiming property in the hands of some other person, e.g. if goods have been forfeited under the laws relating to the customs. They were and are *in personam* when brought for any trespass on the lands of the Crown (information of intrusion), or for any debt due to the Crown (information of debt).[8]

In the second place, the Crown has, in the writ of extent, a very speedy and effectual way of realizing debts due to it. That writ, and the proceedings thereon, are in nature of an execution, under which the body and all the property of the debtor can be taken.[9] This is called an *extent in chief*. But it is also available to seize the property, not only of a debtor of the Crown, but also the property of a debtor of that debtor, and a debtor of that debtor, to any number of degrees.[10] These are called *extents in chief in the first, second or third degrees*. Moreover a debtor to the Crown could, before 1817,[11] use this process to recover his

[1] Halsbury, Laws of England (2nd ed.) ix 699-701.

[2] 50, 51 Victoria c. 53, and the Escheat Procedure Rules made thereunder in 1889.

[3] Below 346 and n. 5.

[4] Bl. Comm. iii 260-266; Halsbury, Laws of England (2nd ed.) ix 698 699

[5] Bl. Comm. iii 261-262. [6] Chitty, Prerogatives of the Crown 332.

[7] Halsbury, Laws of England (2nd ed.) ix 681-682.

[8] Bl. Comm. iii 261-262; Halsbury, Laws of England (2nd ed.) ix 663, 664.

[9] Bl. Comm. iii 420; Chitty, Prerogatives of the Crown 262-264; at the present day the Crown does not seize the debtor's body—the last case in which such a seizure was made was in 1877, Robertson, Civil Proceedings by and against the Crown 194; it did not originate, as is sometimes said, from 33 Henry VIII c. 39 § 37, but it "was a common law remedy of the Crown in the case of debts of record, and was extended by the Act to all debts of the Crown," ibid 189.

[10] Chitty, op. cit. 264-265.

[11] 57 George III c. 117; cp. Halsbury, Laws of England (2nd ed.) ix 678

debt if he made the allegation that, unless he received permission to use it, he was the less able to satisfy the Crown. This was called an *extent in aid*. We have seen that this rule was used by the court of Exchequer to get jurisdiction over common pleas.[1] What is in effect another variety of the writ of extent is the writ of *diem clausit extremum*. By it the process of a writ of extent can be made available against the assets of the deceased debtor to the Crown.[2]

In the third place, we have seen that all kinds of advantages were enjoyed by the Crown in the matter of pleading.[3] Let us recall Bacon's words :

> The king shall be informed of all his adversary's titles ; the king's plea cannot be double, he may make as many titles as he will ; the king's demurrer is not peremptory ; he may waive it and join issue, and go back from law to fact—with infinite others.[4]

The King could never be nonsuit, for, in contemplation of law, he is always present in his courts.[5] It is true that the power of the King to stop an action by the issue of the writ *rege inconsulto* was, in effect, put an end to by Coke's decision against this prerogative.[6] It is true that changes in the law of pleading have made may of these royal privileges obsolete. But many of them still remain. For instance, there can be no counterclaim against the Crown: the subject is put to his petition of right.[7] The practice on informations is not wholly governed by the ordinary code of procedure—the Rules of the Supreme Court.[8] A subject who proposes to traverse an inquisition is bound by all the old rules of pleading, " and the traverser labours under the restrictions which are imposed on those who are pleading against the crown "—e.g. they must not plead double, and can never rely upon a *jus tertii*.[9]

Most of these procedural privileges originated at an early period in the history of the common law. Some of them represent relatively primitive legal ideas. Others represent a period in legal history when the relation of the King to the law, to the courts, and to his judges was very different from the relations

[1] Vol. i 240.
[2] Chitty, op. cit. 328-330 ; Halsbury, op. cit. (2nd ed.) ix 679.
[3] Vol. ix 22-23.
[4] Works (ed. Spedding) vii 693-694, cited vol. ix 23.
[5] " From this ubiquity it follows that the king can never be nonsuit ; for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in court. For the same reason also, in the forms of legal proceedings the king is not said to appear *by his attorney*, as other men do ; for in contemplation of law he is always present in court," Bl. Comm. i 270 ; vol. vi 458 n. 2, 467-468.
[6] Vol. v 439.
[7] Robertson, Civil Proceedings by and against the Crown 565.
[8] Halsbury, Laws of England (2nd ed.) ix 666 and n. (*k*).
[9] Ibid 670

which were established as the result of the Great Rebellion and the Revolution. All of them were worked up into a rigid set of rules in the atmosphere of the most technical part of English law—the law of procedure and pleading. Thus, the mediæval rule that no lord could be sued in his own court gave rise to the rule that no action lay against the King in his own courts.[1] But it soon became evident that some remedy must be given to a subject damaged by the acts of the Crown; and so a complicated and inadequate set of remedies was evolved.[2] Right down to the end of the seventeenth century, the fact that the courts of law were the King's courts, and the fact that the judges were the King's judges, gave the King large powers of control; and these large powers of control possessed by an immortal and infallible King, who was accepted as the head and representative of the state, strengthened the tendency of the judges to give the King all sorts of remedies which were not open to the subject, all sorts of exemptions from the ordinary rules of pleading, and all sorts of procedural privileges.[3] The judges gained independence and security of tenure at the Revolution;[4] but the special remedies, exemptions, and procedural privileges, which had originated in the Middle Ages and had been developed and elaborated in the sixteenth and seventeenth centuries, remained.

All through the eighteenth century they continued to be the basis of a body of rules which, like other branches of the law of procedure and pleading, were continuously developed on purely logical lines. In the nineteenth century they were to some extent revised; but they were not submitted to anything like so drastic a revision as other parts of the law of procedure and pleading. They were part of the prerogative of the Crown;[5] statutes do not affect the prerogative unless the Crown is mentioned specifically or by necessary implication;[6] and the Legislature is always shy of trenching in any way upon it. It is for these reasons that, as we have seen, the law as to the subject's remedies against the Crown badly needs revision.[7] For the same reasons, the law as to the Crown's remedies against the subject needs to be brought up to date; and the need is the

[1] Vol. ix 8. [2] Ibid 7-45.

[3] See vol. ii 562-563; vol. iv 84-85, 274; vol. v 351-352; vol. vi 508-511.

[4] Vol. vi 234, 514.

[5] Thus Robertson, Civil Proceedings by and against the Crown 429, speaking of the procedure on inquisition and traverse, says "the procedure has mercifully been simplified, though not so much as it ought to have been"; and see Attorney-General v. Sillem (1864) 2 H. and C. 581 for a case where it was held that the powers given by the Common Law Procedure Acts 1852 and 1854, to make rules as to practice, procedure, and pleading for the revenue side of the Court of Exchequer, did not enable the judge to apply to the revenue side of the court the provisions of the Common Law Procedure Act 1854 as to appeals.

[6] Below 355, 360. [7] Vol. ix 44-45.

more urgent by reason of the increased powers which the Legislature is in the habit of giving to the Crown and its servants; for many of these powers can be enforced by these drastic prerogative remedies, in the employment of which the crown still has very many of its old procedural and pleading privileges. Moreover, the survival of these procedural prerogatives is at the present day far more dangerous to individual liberty than at any other period, because they are at the disposal of a democratic government—a form of government which Burke, with some reason, said was the most shameless and fearless thing in the world,[1] and more oppressive than any other form of government to a minority; [2] for, while Kings or aristocracies were always more or less conscious of the fact that they must conciliate public opinion by a moderate use of their powers, the majority in a democratic state, however small it is, always imagines that it voices public opinion, and so can act as it pleases without further reflection.

(ii) *Fiscal or proprietary privileges.*

These privileges are included by Blackstone under the ordinary revenue of the Crown, that is "revenue which has either subsisted time out of mind in the Crown, or else has been granted by Parliament, by way of purchase or exchange for such of the King's inherent hereditary revenues, as were found inconvenient to the subject." [3] They consisted of a large number of miscellaneous items:

(*a*) Ecclesiastical revenue.[4] This included the custody of the temporalities of bishoprics, and the right to a corody [5] for the maintenance of one of his chaplains out of each bishopric—both of which had ceased to exist in Blackstone's day; tithes arising in extra-parochial places, which the King was under an implied trust to distribute for the good of the clergy; first-fruits

[1] "When popular authority is absolute and unrestrained, the people have an infinitely greater, because a far better founded confidence in their own power. They are themselves in a great measure their own instruments. They are nearer to their objects. Besides they are less under responsibility to one of the greatest controlling powers on earth, the sense of shame and estimation. The share of infamy that is likely to fall to the lot of each individual in public acts is small indeed. . . . Their own approbation of their own acts has to them the appearance of a public judgement in their favour. A perfect democracy is therefore the most shameless thing in the world," French Revolution 138-139.

[2] "Of this I am certain, that in a democracy, the majority of the citizens is capable of exercising the most cruel oppressions upon the minority, whenever strong divisions prevail in that kind of polity, as they often must; and that oppression of the minority will extend to far greater numbers, and will be carried on with much greater fury, than can almost ever be apprehended from the dominion of a single sceptre," ibid 186.

[3] Bl. Comm. i 281.

[4] Ibid i 282-286.

[5] For corodies see vol. iii 152-153.

and tenths of all spiritual preferments in the kingdom—a revenue which, since 1703, has been vested by statute in the trustees of Queen Anne's bounty, in order to provide a fund for the augmentation of poor livings.[1]

(*b*) The rents and profits of the demesne lands of the Crown.[2] The extensive grants made by the Crown all through English history had reduced this revenue to a very small compass; and William III's liberality had been the subject of complaint in Parliament. His liberality was the immediate occasion for the passing of the statute of 1701,[3] which deprived the Crown of power to make these grants in perpetuity, and enacted that grants should only be made for the terminable periods therein specified. In 1760 these revenues, together with other branches of the ordinary revenue of the Crown, were surrendered, and made payable to the Aggregate Fund, out of which Parliament granted to the Crown a fixed civil list.[4] But the Act preserved the powers of the Crown over the control and management of these estates, subject only to the restriction imposed by the statute of 1701.[5] So careless, and even corrupt, was this management, so great was the expense of the number of officials who were supposed to superintend these revenues,[6] that, during the first twenty-five years of George III's reign, the Crown estates only produced an average net income of a little over £6,000 a year.[7] Adam Smith said that they did not "at present afford the fourth part of the rent, which would probably be drawn from them if they were the property of private persons"; and that "if they were more extensive, it is probable they would be still worse managed."[8] Burke in 1780 despaired of efficient public management, and proposed that these estates, together with the King's rights over the forests, should be sold. He said:[9]

A landed estate is certainly the very worst which the crown can possess. All minute and dispersed possessions, possessions that are often

[1] 2, 3 Anne c. 11; Bl. Comm. i 286 and Christian's note.

[2] Bl. Comm i 286-287; Report on Public Income and Expenditure, Parlt. Papers, 1868-1869 xxxv Pt. II App. 431-455.

[3] 1 Anne St. 1 c. 7 §§ 5-9.

[4] 1 George III c. 1 § 3.

[5] Ibid §§ 9 and 10.

[6] "Encroachments and waste were permitted upon the royal demesnes, with scarcely a check. Such mismanagement, however, was not due to any want of officers, appointed to guard the public interests. On the contrary, their very number served to facilitate frauds and evasions. Instead of being a check upon one another, these officers acted independently; and their ignorance, incapacity, and neglect went far to ruin the property under their charge. As an illustration of the system, it may be stated that the land tax was frequently allowed twice over to lessees; from which error alone, a loss was sustained of upwards of fifteen hundred pounds a year," Erskine May, Constitutional History i 253-254.

[7] Ibid 254.

[8] Wealth of Nations (Cannan's ed.) ii 308.

[9] Speech on Economical Reform, Works (Bohn's ed.) ii 79; and with this view Adam Smith agreed, Wealth of Nations ii 308-309.

of indeterminate value, and which require a continual personal attendance, are of a nature more proper for private management than public administration. They are fitter for the care of a frugal land steward than of an office in the state.

Fortunately Burke's advice was not followed. In 1786 a statutory commission was set up to enquire into the land revenues of the Crown; and, as the result of their recommendations and of subsequent statutes, the revenue from these sources has been enormously increased. In 1798 they were valued at £201,250 a year, and in 1860 at £416,530 a year.[1]

(*c*) We have seen that in 1660 the King gave up his revenue derived from the incidents of tenure, and also his rights of purveyance; and that he was compensated by the grant of an hereditary excise on beer,[2] to which was added the revenue derived from the sale of licences to sell wine by retail.[3] The last-named source or revenue was abolished in 1757,[4] "and an annual sum of upwards of £7,000 *per annum* issuing out of the new stamp duties imposed on wine licences, was settled on the Crown in its stead."[5] Both these sources of revenue were surrendered in 1760, together with the revenues derived from the Crown lands, in return for an annual civil list.[6]

(*d*) The profits of the King's courts of justice. "These consist not only in fines imposed upon offenders, forfeitures of recognizances, and amercements levied upon defaulters; but also in certain fees due to the Crown in a variety of legal matters, as, for setting the great seal to charters, original writs, and other forensic proceedings, and for permitting fines to be levied of lands in order to bar entails, or otherwise to ensure their title."[7] Some of these fees were surrendered in 1760.[8] But, for the most part, the right to receive them had long since been alienated by the Crown. We have seen that they were either allocated to increase the salaries of the judges, or were in the hands of officials who had sometimes a freehold interest, and in a few cases an hereditary interest, in their offices.[9] Blackstone's statement that "though our law proceedings are still loaded with these payments, very little of them is now returned into the King's exchequer,"[10] is quite accurate.

(*e*) A fifth branch of the ordinary revenue, which was not

[1] Erskine May, Constitutional History i 254-255.

[2] Vol. vi 166; 12 Charles II c. 24; Report on Public Income and Expenditure, Parlt. Papers 1868-1869 xxxv Pt. II App. 457.

[3] 12 Charles II c. 25 §§ 2, 3, 6.

[4] 30 George II c. 19 § 13.

[5] Bl. Comm. i 288.

[6] 1 George III c. 1 § 3.

[7] Bl. Comm. i 289.

[8] 1 George III c. 1 § 3—"the monies arising by fines from writs of covenant and writs of entry, payable in the alienation office"; and "the monies arising by the post fines."

[9] Vol. i 254-255, 256-262.

[10] Comm. i 289-290.

surrendered in 1760, is the droits of the Crown and the admiralty —royal fish, wreck of the sea, flotsam, jetsam, and lagan, ships or goods of the enemy found in English ports or captured by uncommissioned vessels, and goods taken or retaken from pirates.[1] We have seen that these rights were sometimes granted to subjects; but that they were for the most part in the hands of the Crown during the eighteenth century.[2]

(*f*) The right of the King or other lord to take as an escheat the lands of his tenant in fee simple, who dies without heirs and intestate, was not one of the incidents of tenure which were abolished in 1660. We have seen that, as a result of the working of the statute of Quia Emptores (1290), it was a right which, in the case of lands held by free tenure, was almost entirely a right belonging to the Crown.[3] Similarly if a person died without leaving any next-of-kin and intestate, or if a trust of personalty failed and the settlor had died without leaving any next-of-kin and intestate, or if a corporation was dissolved, chattels real or personal and choses in action went to the Crown as *bona vacantia*.[4] Blackstone gave an undue extension to the category of things which, as *bona vacantia*, belonged to the Crown, when, mis-stating a sentence from Bracton, he said that they included all property which had no owner, and, as such, went to the first occupant by the law of nature.[5] In fact, as Christian points out, Blackstone contradicts himself; for in an earlier page he had laid down the correct rule that property abandoned by its owner "belongs, as in a state of nature, to the first finder."[6] We have seen that it is only certain kinds of ownerless things which, as *bona vacantia*, belong to the Crown by virtue of its prerogative.[7] The list of these things includes the droits of the Crown and the admiralty,[8] treasure trove,[9] waifs,[10] estrays,[11] royal mines,[12] royal fowl and fish,[13] and, as we have seen, the property of deceased persons who die intestate and without relatives entitled to take their property. The last class of *bona vacantia* is the most important; and its importance has been increased by the Property Legislation of 1925. In the first place, the law of escheat is abolished by the Administration of Estates Act 1925, and freeholds now devolve as *bona*

[1] Bl. Comm. i 290-294; vol. i 559-560; Report of Public Income and Expenditure, Parlt. Papers 1868-1869 xxxv Pt. II App. 466-469.
[2] Vol. i 560-561. [3] Vol. iii 67, 68, 71-72.
[4] Ibid 72, 353, 561 and n. 9; vol. vii 495; vol. ix 69; on the whole subject of Bona Vacantia see F. A. Enever, Bona Vacantia under the Law of England.
[5] Comm. i 299, and Christian's note; see the passage from Bracton (f. 8) cited vol. vii 495 n. 4.
[6] Comm. i 295. [7] Vol. vii 495. [8] Above 349-350.
[9] Vol. i 86-87; Bl. Comm. i 295-296. [10] Ibid 296-297.
[11] Ibid 297-298. [12] Ibid 294-295; vol. i 151-152.
[13] Bl. Comm. i 222; The Case of Swans (1592) 7 Co-Rep. 15b; Forsyth, Cases and Opinions on Constitutional Law 178-179.

vacantia.[1] In the second place, by the same Act, the classes of relatives entitled to take on intestacy is restricted.[2]

(*g*) The revenue derived from "forfeitures of lands and goods for offences."[3] We have seen that a felon's freeholds escheated to the lord, subject to the Crown's right to "year day and waste,"[4] that a traitor's freeholds were forfeited to the Crown,[5] and that all the chattels of felons and traitors were likewise forfeited to the Crown.[6] We have seen, too, that any personal chattel which was "the immediate occasion of the death of any reasonable creature"[7] was forfeited to the King as a deodand, "to be applied to pious uses, and distributed in alms by his high almoner."[8] Deodands were abolished in 1846,[9] and escheats of freeholds for felony, and forfeitures of freeholds and chattels, were abolished in 1870.[10] The modern state has found that the confiscation, by means of death duties, of a considerable part of the property of its most prosperous and generally its most deserving citizens, is a far more lucrative source of revenue than the confiscation of the whole of the property of the generally impecunious persons who have been found guilty of the more heinous variety of crimes. Envy of the deserving because they are rich, and sympathy with the poor even though they are criminals, are characteristics of the perverted vision of a democracy.

Many of the mediæval fiscal and proprietary privileges of the Crown were obsolete when Blackstone wrote. Some have been abolished by the legislation of the nineteenth and twentieth centuries. Others have increased in value—notably the revenue from demesne lands of the Crown, and from *bona vacantia;* and the value of all these fiscal and proprietary privileges is enhanced by those procedural privileges which give the Crown many advantages over the subject when it is necessary to resort to litigation in order to enforce them.[11] We shall now see that the value of all these privileges—fiscal, proprietary, and

[1] 15 George V c. 23 § 45 (1) (*d*). [2] § 46 (1) (i)-(v).
[3] Bl. Comm. i 299. [4] Vol. iii 67, 68-70, 71-72. [5] Ibid 70-71, 72.
[6] Ibid 329-330. [7] Bl. Comm. i 300.
[8] Ibid; for deodands see vol. ii 47 and n. 1. [9] 9, 10 Victoria c. 62.
[10] 33, 34 Victoria c. 23, § 1; the justice of exacting an escheat of freeholds and forfeiture of chattels for felony, and a forfeiture of land and chattels for treason was defended by Blackstone, Comm. i 299; and the justice of exacting forfeiture for treason was defended by Charles Yorke, Considerations on the law of Forfeiture, and by Chitty, Prerogatives of the Crown 214-215—"to visit the consequences of a crime on the innocent posterity of the offender, by depriving them of his property, may seem unjust; but investigation will establish the wisdom of making the natural and social affections a controul upon irregular and selfish passions. And it is observable, that the right of inheritance being, it seems, rather a matter of civil regulation and policy, than exclusively conferred by the law of nature, it is not injustice to interweave with those regulations such as manifestly tend to confirm the bonds of society"; with this view Bacon agreed, see vol. vii 200.
[11] Above 343-345.

procedural—is still further enhanced by some of those quasi-fiscal or quasi-proprietary privileges which form part of the incidental prerogatives of the Crown.

(iii) *Quasi-fiscal or Quasi-proprietary privileges.*

Under this head are included a large number of miscellaneous rights and privileges. Blackstone, wisely, does not attempt to give an exhaustive catalogue of them; and I shall follow his example. I shall merely give a few illustrations, which I shall group under the following heads: privileges given by reason of the dignity of the King; privileges given to him by reason of his position as the representative of the state; and privileges given by reason of the preference shown to the King when his interest conflicts with that of a subject.

Privileges given by reason of the dignity of the King.—Though the King is personally above the law and is therefore not amenable to its process,[1] his servants are responsible to the law for all their acts, official or otherwise.[2] But the law has, from the earliest time, recognized that the servants of persons or bodies which are entrusted with powers of government need special privileges in order that those persons or bodies may be able to perform their duties. The King's courts, for instance, including the High Court of Parliament, because they were the King's courts, had special privileges, which gave to them, or their members or servants, rights and powers and exemptions from the ordinary rules of law.[3] Since the privileges enjoyed by these courts originated in the fact that they are the King's courts, since it is their close connection with the person of the King which is the original cause from which the various kinds of privileges enjoyed by governmental bodies developed, it is only natural that the King himself should be still more highly endowed with privileges of a similar kind. The King's servants attending upon him had the same privilege of freedom from arrest on mesne process, or process in execution of judgment in civil actions, as members of Parliament and their servants.[4] They could not be arrested without the King's leave obtained from the Chamberlain of the Household.[5] To what servants of the Crown this privilege extended was never quite settled.[6] At

[1] Vol. iii 388; vol. ix 9-10. [2] Vol. vi 101-103, 267.

[3] Vol. ii 433; vol. vi 93-95; Coke, Fourth Instit. 23-24; Bl. Comm. iii 288-289.

[4] Coke, Second Instit. 631; Anon. (1666) T. Raym. 152; Bartlett v. Hebbes (1794) 5 T.R. 686; the privilege was not forfeited by the fact that the servant was engaged in trade, King v. Foster (1809) 2 Taunt. 167.

[5] The King v. Moulton (1666) 2 Keb. 3; The King v. Frampton (1669) 2 Keb. 485; Chitty, Prerogatives of the Crown 374.

[6] Ibid 375; cp Luntley v. Battine (1818) 2 B. & Ald. 234 and the note to that case.

one time, indeed, it would seem that the King could, by a writ of protection, stay for a year all actions against all persons in his service out of the realm. This prerogative was practically obsolete when Blackstone wrote.[1] But the privilege of the personal servants of the Crown still existed. It was settled, however, that, as the privilege was the King's and not the servant's,[2] he could limit it as he pleased.[3] It was settled also that these privileges were attached, not only to those attending upon the King, but also to those employed in any of the royal residences—whether the King was actually residing there or not.[4] This extension easily led to the idea that not only could no arrest be made, or other judicial process executed, in the King's presence, but that this immunity extended to all the King's residences;[5] so that they were privileged places, within the verge of which no arrest or other judicial process could be executed without the King's assent[6]—just as no arrest could be made in any court where the King's justices were sitting,[7] or criminal process served within the walls of Parliament.[8] Moreover we have seen that the King had special courts in which wrongs done within certain distances from the place where he was residing, could be redressed.[9] These privileges are now of little practical importance—partly owing to changes in the law of civil procedure,[10] and partly owing to the abolition or the disuse of the courts which had special jurisdiction over the places in which the King was residing.[11]

Analogous to these special exemptions, which the law gives to the King's servants and palaces, in order that the royal dignity may be supported, are certain proprietary rights and

[1] Comm. iii 289 n. (*m*)—"king William, in 1692, granted one to Lord Cutts to protect him from being outlawed by his taylor: (3 Lev. 332) which is the last that appears upon our books."

[2] The King v. Moulton (1666) 2 Keb. 3; Anon. (1666) T. Raym. 152; King v. Foster (1809) 2 Taunt. 167.

[3] Chitty, Prerogatives of the Crown 375; Luntley v. Battine (1818) 2 B. & Ald. at p. 237.

[4] Elderton's Case (1703) 2 Ld. Raym. 978; Winter v. Miles (1809) 10 East. 578; apparently a royal palace which is not in fact kept up as a royal residence is not privileged, Attorney-General v. Dakin (1870) L.R. 4 H. of L. 338; cp. Combe v. De La Bere (1882) 22 C.D. at pp. 331-332.

[5] Coke, Third Instit. 140; Bl. Comm. iii 289.

[6] The verge was usually a space of twelve miles round the palace, vol. i 208; 28 Henry VIII c. 12 enacted that the verge of the palace of Westminster should extend from Charing Cross to Westminster Hall, Bl. Comm. iii 289 n.

[7] Bl. Comm. iii 289

[8] Erskine May, Parliamentary Practice (13th ed.) 89.

[9] Vol. i 91, 207-209; the court instituted by 33 Henry VIII c. 12 to hear and determine treason, murders, manslaughters, and malicious strikings within two hundred feet of the King's palaces or other places where the King is residing (Coke, Fourth Instit. 133; Bl. Comm. iv 276) is apparently still an existing court, as the statute has not been wholly repealed.

[10] For a similar effect on Parliamentary privilege caused by these changes in the law see below 546-547.

[11] Vol. i 208-209.

privileges, which the law regards as the consequences of, or inferences from, that dignity. The King could not be a copyholder.[1] He cannot be a joint tenant of real estate, nor the joint owner of a chattel. In the former case the King took his share in severalty,[2] but in the latter case he got the whole [3]— though at the beginning of the nineteenth century an exception was made in the case of partners, and it was held that, on an extent against one of several partners, the Crown could only take the interest of the partner.[4] His property is not subject to the ordinary burdens and incidents which affect the property of the subject. Thus

> the king is not liable to pay taxes, toll, pontage, passage, custom, or poor rates ; nor is his personal property subject to the laws relative to wreck, estrays, waif, sale in market overt, distress damage feasant and the like. It is indeed generally laid down that " no custom which goes to the person, or goods, of the king shall bind him." [5]

We have seen that in the thirteenth century the prerogative was regarded as a series of " exceptions in favour of the Crown to those general rules that are established for the rest of the community." [6] It is, as Blackstone says,[7] " in its nature singular and eccentrical." The exceptional character of the law relating to King's prerogative is illustrated by the rule just cited, that it is not necessarily bound by the customary law which binds the subject.[8] This characteristic was still further emphasized by the fact that the King is not bound by a statute unless he is expressly named,[9] or unless he is bound by necessary implication,[10] or unless the statute, being for the public good, it would be absurd to except the King from it.[11] Blackstone summed up accurately the results of his authorities when he said : [12]

[1] " Si copihold terre soit en le main dun subject que est apres prefer al Royal dignity le copihold est extinct pur ceo est desouth le Majesty du Roy a performer les servile offices que chescun copiholder doit performe. Et uncore apres son disseas le prochein que droit ad serra admit et le tenure serra revive en luy," Field v. Boothsby (1658) 2 Sid. at p. 82 ; Chitty, Prerogatives of the Crown 378.

[2] Willion v. Berkley (1561) Plowden at p. 247.

[3] Ibid at p. 243 ; Bl. Comm. ii 409.

[4] The King v. Sanderson (1810) Wight. 50.

[5] Chitty, Prerogatives of the Crown 376-377, and the authorities there cited. But land bought from the King's private funds is liable to rates and taxes, 39, 40 George III c. 88 § 6 ; 25, 26 Victoria c. 37 §§ 8 and 9.

[6] Vol. iii 460. [7] Comm. i 239. [8] Above n. 5.

[9] Willion v. Berkley (1561) Plowden 239-240 ; Chitty, Prerogatives of the Crown 382, 383.

[10] Crook's Case (1692) 1 Shower 208 ; cp. Attorney-General v. De Keyser's Royal Hotel [1920] A.C. at p. 539.

[11] " It was unanimously resolved that general statutes which provide necessary and profitable remedy for the maintenance of religion, the advancement of good learning, and for the relief of the poor, shall be extended generally according to their words ; and God forbid that by any construction, the Queen, who made the act with the assent of the Lords and Commons should be exempted out of this Act of 13 Eliz., which provides necessary and profitable remedy for the maintenance of religion, the advancement of good literature and the relief of the poor," Magdalen College Case (1616) 11 Co. Rep. at f. 70*b*. [12] Comm. i 261-262.

The king is not bound by any act of Parliament, unless he be named therein by special and particular words. The most general words that can be devised . . . affect not him in the least, if they may tend to restrain or diminish any of his rights or interests. For it would be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed without its own express consent, by constructions and implications of the subject. Yet, when an act of Parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the king as upon the subject; and, likewise, the king may take the benefit of any particular act, though he be not specially named.

This prerogative principle has wide and far-reaching effects. One of the most important of these effects—an effect which has sometimes worked great injustice—is the rule that no statutes of limitation bind the Crown—*nullum tempus occurrit regi*.[1] This principle is justified partly on the ground that no laches can be imputed to an impeccable King,[2] partly on the ground that "he cannot so nearly look to his particular because he is intended to consider *ardua regni pro bono publico*," [3] and partly on the ground that he ought not "to suffer for the negligence of his officers." [4] But, as periods of limitation are the creatures of statute law, it could equally well be grounded on the fact that these statutes did not bind the King. This principle was given a very wide operation; [5] and it is still a principle of English law, except in so far as statutes have fixed periods of limitation for the assertion of the King's rights in civil [6] and criminal cases.[7]

Privileges given to the King by reason of his position as the representative of the state.—Amongst these can be classed the

[1] Vol. i 87; vol iii 467: Magdalen College Case (1616) 11 Co. Rep. at f. 74*b*.

[2] "In further pursuance of this principle (the king can do no wrong) the law also determines that *in* the king can be no negligence, or *laches*, and therefore no delay will bar his right," Bl. Comm. i 247.

[3] Sir Edward Coke's Case (1624) Godbolt at p. 295.

[4] "It is no reason that the negligence of his officers, and perhaps their compact and combination with the adverse party, should defeat the king. Vigilantibus et non dormientibus jura subveniunt is a rule for the subject; but nullum tempus occurrit regi is the king's plea," Sheffield v. Radcliffe (1616) Hob. at p. 347.

[5] "The King cannot be barred by a fine to which he is not a party, and five years' non-claim. Nor can there be a tenant at suffrance against the King; for as no laches can be imputed to his Majesty for not entering, if the King's tenant hold over, he will be considered as an intruder. So no man by entry can at common law gain himself a title against the King, nor will any descents toll his entry. So the statute of limitations does not bind the King," Chitty, Prerogatives of the Crown 379-380, and the references there cited.

[6] E.g. for actions for the recovery of land a period of 60 years was fixed by the Nullum Tempus Act 9 George III c. 16 § 1; the immediate occasion for the Act was the action taken by Sir James Lowther to question a grant made by William III to the Duke of Portland, and to procure a lease for himself of property which had long been enjoyed by the duke, see Parlt. Hist. xvi 405-412, 596-598.

[7] E.g. 7, 8 William III c. 3 § 5, fixed a period of three years for most varieties of treason. It may be noted that Governor Wall was tried for murder nineteen years after its commission (1802) 28 S.T. 51; and that, in the case of William Horne (1759) there was an interval of thirty-five years, Annual Register (5th ed.) ii 368.

right and the duty of the King to act as the guardian of infants, lunatics, and idiots.[1] The King's rights and duties in respect to the guardianship of infants were, in respect to his tenants by knight service, handed over to the court of Wards and Liveries ;[2] and, in respect to others, to the Lord Chancellor.[3] The abolition of the military tenures and their incidents in 1660 meant a considerable increase in the powers and duties of the Lord Chancellor ; and it is in his court of Chancery that the greater part of the modern law as to the guardianship of infants has been developed.[4] The King's rights in respect of lunatics and idiots date, as we have seen, from the latter part of the thirteenth century.[5] We have seen that, in the case of idiots, it was originally a profitable right analogous to the right of wardship ; but that in the case of lunatics it was in the nature of a duty, and no profit could be made out of it.[6] We have seen that, though Blackstone mentions the income of idiots' estates as a source of revenue,[7] the clemency of the Crown and the pity of juries gradually assimilated the position of idiots to that of lunatics.[8] It was largely due to this development that the King's prerogatives in this matter were delegated, like his prerogative in respect of infants, to the Lord Chancellor ;[9] and that the modern law as to lunatics has, like the modern law as to the guardianship of infants, been developed partly by the Legislature,[10] and partly by the court of Chancery.

Privileges given to the King by reason of the preference shown to the King when his interest conflicts with that of a subject.—The superior dignity of the King, and his special relations to the law and to his judges, have always induced the courts to give special advantages to the King, when his interest and that of a subject conflict. Some of the judges of the Stuart period gave an exaggerated expression to these advantages. Thus, in 1624, Hobart, C.J., said :[11]

> The law amplifies everything which is for the king's benefit or made for the king. . . . Everything for the benefit of the king shall be taken largely, as everything against the king shall be taken strictly. . . . The

[1] Bl. Comm. i 463. [2] Vol. iv 466. [3] Vol. v 315.
[4] Vol. vi 648-650 ; vol. xii 226 and n. 2. [5] Vol. i 473. [6] Ibid 474.
[7] Comm. i 302. [8] Vol. i 474. [9] Ibid 474-476.

[10] The first Act regulating asylums was passed in 1774, 14 George III c. 49 ; it required asylums in London and Westminster and within seven miles of the same to be licensed annually by commissioners chosen by the college of Physicians, who were to visit and inspect the licensed houses, to enquire whether particular persons were confined in any of these houses, to receive notices of the admission of all patients ; no one was to be received into an asylum without the order of a physician or surgeon or apothecary ; elsewhere the quarter sessions could issue annual licences, and the justices were to have power to visit these houses ; the Lord Chancellor or the two Chief Justices could order the commissioners or the justices to visit these houses.

[11] Sir Edward Coke's Case, Godbolt at p. 295.

prerogative law . . . is the law of the realm for the king, as the common law is the law of the realm for the subject.

But, though some of the Stuart judges may have given an exaggerated expression to these rules, they were old-established rules, and it was not necessary to go beyond the precedents.

The general rule that in all cases where the King's right and that of a subject conflicted, the King was preferred, had, from a very early date, been elaborated with great minuteness; it manifested itself in many different branches of the law; and it was sometimes extended by statute.[1] Thus, the King's debt was always preferred to a subject's.[2] "Even a prior seizure under a *fieri facias* does not operate or render the execution complete against an extent."[3] If the King and a subject claimed property by separate titles, both good, the King's was preferred.[4] "The King is not bound by estoppels, nor recoveries had betwixt strangers, nor by the fundamental jurisdiction of courts, as appeareth, 38 Ass. 20, when a suit was for tythes in the Exchequer, being a meer spiritual thing."[5] On the other hand the King could take advantage of an estoppel, though, as between subjects, estoppels must be mutual.[6] It is clear that this preference given to the King when his interest conflicts with that of a subject, easily shades off into, and is made effective by means of those extensive procedural privileges which the law gives to the King.[7] It is clear also that the rules to which this preference has given rise need revision, as badly as the rules relating to the King's procedural privileges, and for much the same reasons.[8]

(iv) *Limitations upon these prerogatives.*

This miscellaneous collection of rights and privileges, which make up the incidental prerogatives of the Crown, come, as I

[1] 33 Henry VIII c. 39 § 74. An Act establishing the court of Surveyors of the King's Lands, vol. ix 29, 30—provides that the King shall be preferred to the subject in all suits and executions, provided that the suit was begun or the process was awarded before judgment was given for the subject.

[2] Bl. Comm. ii 511; *In re* Henley & Co. (1878) 9 C.D. at pp. 481-482 *per* James L.J.

[3] Chitty, Prerogatives of the Crown 288.

[4] Ibid 381; Coke, Co. Litt. 30b, gives the following illustration: "A woman taketh husband, and hath issue, lands descend to the wife, the husband enters, and after the wife is found an idiot by office, the land shall be seised to the king, for the title of the tenancy by the curtesie and the king began at one instant, and the title of the king shall be preferred."

[5] Sir Edward Coke's Case (1624) Godbolt at p. 299; in the case cited from the 38th Book of Assizes, where the Exchequer assumed jurisdiction in a case of tithes, the court had said, "de tout ceo que touche le Roy, et puit torner en avantage de luy, de haster sa besoign, nous prendrons conisance"; but the reporter appended to the case this note: "Quod mirum. Et nota qu'en la Common Bank, n'en Bank le Roy, les Courts ne voudront tenir conusance des dismes."

[6] Chitty, op. cit. 381. [7] Above 343-345. [8] Above 346-347.

have already pointed out,[1] from many different periods in English legal history, and are based on many different ideas. One set of these ideas can be traced to the feudal conception of the King as a lord of tenants; others can be traced to ideas derived from Roman law;[2] others to deductions from the fact that the courts are the King's courts, and that lords who have courts have special privileges in their courts; others to the need for maintaining the King's dignity, and for securing his freedom of action; others to the idea that the King is the head and representative of the state. All these diverse ideas have, from an early date, become the starting-points for the continuous development of bodies of very technical rules, some of which are wholly or partially obsolete, while others have survived, and still function in an environment to which they are ill suited. The reason why these bodies of technical rules have thus been continuously developed from a comparatively early date, is to be found in the fact that the King was and is a constant litigant in his courts in many capacities. As Bacon put it in the case of *The Postnati*, "although the King in his person be *solutus legibus*, yet his acts and grants are limited by law, and we argue them every day."[3] Since there has been argument every day on many of the royal activities, from the time of the earliest Year Book to our own days, it is not strange that these prerogative rights of the King had, long before the close of the mediæval period, given rise to complex bodies of detailed and technical rules.

This development had two effects upon these incidental prerogatives. In the first place, it made for their elaboration and accentuation. We have seen that the judges did not forget that they were the King's servants. As such, they were ready to develop, to their utmost logical consequences, principles and rules which favoured the King. The examples which have already been given of this characteristic of the judicial mind are a sufficient illustration of this tendency.[4] But, in the second place, we have seen that, throughout the Middle Ages, the dominant political idea of the supremacy of law led the judges to think that the prerogative of the Crown should be subject to the law.[5] The application of this idea to these incidental prerogatives was emphasized, because they came frequently before the courts.[6] And so we see that, side by side with the elaboration and accentuation of these prerogatives, there grew

[1] Above 345-346, 354, 356-357.

[2] E.g. the rules as to treasure trove, royal mines, and some of the rules as to *bona vacantia*.

[3] Works (ed. Spedding) vii 646, cited vol. iii 461 n. 1; for other opinions of Bacon and others to the same effect see vol. vi 22 n. 1.

[4] Above 343-345, 356-357.

[5] Vol. ii 253-255, 435-436, 441; vol. iv 187-189.

[6] Vol. ii 561-562.

up a number of limitations upon their exercise. Let us look at one or two illustrations.

These prerogatives belong to the King. He cannot grant them out to any one else.[1] In the language of the sixteenth and seventeenth centuries, they were "inseparable" from his person.[2] We have seen that this idea of an "inseparable" prerogative played some part in the arguments of the prerogative lawyers in the seventeenth century. They argued that, because the prerogative was inseparable, it could not be taken away even by an Act of Parliament; and they concluded, therefore, that it was superior to an Act of Parliament.[3] This conclusion was negatived by the Great Rebellion and the Revolution. But there was an element of truth in this idea of inseparability. Powers granted to an official for a particular purpose cannot be alienated to another, for profit or otherwise, if such alienation would frustrate the purpose for which the powers were given. This principle is especially applicable to that complex of powers included under the term prerogative, which is entrusted to the King;[4] for upon the existence and prudent exercise of these powers the safety of the state may depend. Moreover the King is responsible for the exercise of these powers, which responsibility cannot and ought not constitutionally to be delegated to any other person or body—not even to Parliament. "It is well known," said Lord Strange in 1754,[5] "that there are several acts of power which the King not only may, but ought to exercise by virtue of prerogative alone: and for the exercise of which it would be very improper to ask the authority of an Act of Parliament"—instances are the declaration of war or the making of a treaty of peace. The reason why it would be improper is this: "in all cases where the King may constitutionally act by prerogative, the previous interposition of Parliament will generally be dangerous, because plausible reasons may be previously urged for obtaining our authority, which could not afterwards be urged, or not urged with equal weight, for obtaining our approbation; . . . we could not afterwards condemn what we had before authorized, even though it should appear that our authority had been obtained upon suggestions, that were absolutely false or groundless."

We have seen that it is upon the ground that the strength of the executive government must be maintained, and that,

[1] Broke, Ab. *Patents* pl. 13; ibid *Prerogative* pl. 60; in Y.B. 2 Henry VII Hil. pl. 16, Keble said that the king could not give a licence to another to create a corporation; cp. Y.B. 20 Hy. VII Mich. pl. 17, cited vol. iv, 204 n. 2.

[2] Vol. iv 204-206. [3] Ibid 205-206.

[4] Ibid 204-205; the Case of Penal Statutes (1605) 7 Co. Rep. 36; the Case of the King's Prerogative in Saltpetre (1607) 12 Co. Rep. at p. 13.

[5] Parlt. Hist. xv 275-276.

consequently, its powers ought not to be curtailed without its consent, that Blackstone justifies the rule that, generally, the King is not bound by Acts of Parliament [1]—a principle of public policy which, as we shall see, has left some very distinct and not wholly beneficial traces in our modern law.[2] Historically the principle is connected with the idea of an inseparable prerogative. But Blackstone does not put it upon this ground, partly because the idea of inseparability was too closely connected with the reasoning of the prerogative lawyers of the Stuart period, and partly because the principle, as they stated it, was too wide. The rule that the King is not bound by Acts of Parliament is, as we have seen, subject to important limitations.[3] The King may be bound by an Act of Parliament by the express words of the statute or by necessary implication. Obviously these limitations opened a wide field for judicial limitation and definition. The judges must determine whether a statute binds the King expressly or by necessary implication; and, as it is impossible to distinguish common law from statute law, it follows that they must also determine the ambit of those large parts of the prerogative which depend on the common law.

This process of interpretation tended, more especially after the Revolution, to limit the independent action of the King. The King could not, for instance, arrest a man. Powers of arrest were fettered by strict legal conditions. For a wrongful arrest the injured person must have a remedy, which he could not have if the King in person could make the arrest.[4] Similarly the jurisdiction of courts was a matter which depended on the rules of the common law. The King could not interfere with the boundaries of these jurisdictions, because he had no power to change the rules of the common law.[5] For the same reason the King could not, by an exercise of his prerogative, prejudice those rights of his subjects which were secured to them by the rules of the common law. "The King's prerogative," says Finch, "stretcheth not to the doing of any wrong."[6] This was a serious limitation upon his powers. Thus, he could not, by the exercise of his power to pardon, prejudice the right of an injured person to prosecute a criminal appeal;[7] nor could he pardon the

[1] Above 355. [2] Below 657-658. [3] Above 355.

[4] Y.B. 1 Hy. VII Mich. pl. 5, cited vol. ii, 562 n. 5; Coke, Second Instit. 186.

[5] "Le Roy ne poit grant un Leet forsque come le court de Leet est use et ad use; car il mesme ne poit aver Leet et ce use auterment que ad este use," Y.B. 6 Hy. VII Trin. pl. 4; cp. Forsyth, Cases and Opinions on Constitutional Law 187; from this Coke deduced the conclusion that the Crown could not, without statutory authority, create a new court with a jurisdiction other than that of the common law, Fourth Instit. 87; and this is now recognized as a settled principle of law, see *In re* Lord Bishop of Natal (1864) 3 Moo. P.C. N.S. 115 at p. 152; vol. xi 265-267.

[6] Law (ed. 1759) 84.

[7] Third Instit. 236-237, citing Bracton f. 132b—"non enim poterit rex gratiam facere cum injuria et damno aliorum."

commission of a nuisance ; [1] nor could he grant a market which would injure the market already granted to another.[2] We have seen that the conditions under which the Crown could be compelled to give legal redress to his subjects by petition of right or otherwise had given rise to a very technical body of law.[3]

For these legal limitations upon the exercise by the King of his prerogative much mediæval authority could be cited. No doubt, in the sixteenth century, they were mainly heard of in connection with those incidental prerogatives of the Crown, which came frequently before the courts ; and Bacon and other prerogative lawyers would have liked to confine them to these prerogatives.[4] In their view the "direct" prerogatives of the Crown were matters of state, not fit to be disputed by the lawyers.[5] But this limitation was difficult. No such distinction was known to the mediæval common law ; and, as the sixteenth century proceeded, the judges were driven to apply these limitations to attempted encroachments by the Crown both upon their own privileges and perquisites, and upon the jurisdiction of their courts. Attempts by the Crown to appoint to offices which the chief justices regarded as being within their own gift ; [6] and arrests by the Star Chamber and other courts in the course of their exercise of a jurisdiction which was encroaching upon the jurisdiction of the common law courts [7]—led them to stress the capacity of the common law to define and limit the prerogative. We have seen that this capacity of the common law to define and limit the prerogative was the central tenet of Coke's faith, and that it cost him his seat on the bench.[8] We have seen that he maintained that the common law was supreme in the state, that it could define the limits of all branches of the prerogative, and that it could be changed only by the King in Parliament.[9] Coke's ideas triumphed at the Revolution. After 1688 it was clear that the prerogative in all its parts was subject to law.[10] Therefore many of these mediæval limitations upon the incidental prerogatives of the Crown could be applied to the prerogative as a whole. It is for this reason that, in the eighteenth century, a definite body of constitutional law is beginning to grow up as to the direct as well as to the incidental prerogatives of the Crown.

[1] Third Instit. 237.

[2] Second Instit. 406—"If one hath a market, either by prescription or by letters patents of the king, and another obtains a market to the nusans of the former market, he shall not tarry till he have avoided the letters patents of the latter market by course of law, but he may have an assize of nusans."

[3] Vol. ix 9-44. [4] Vol. vi 22 n. 1.

[5] "As for the absolute prerogative of the crown, that is no subject for the tongue of a lawyer, nor is it lawful to be disputed," James I's Speech in the Star Chamber, Works 557, cited vol. vi 22 n. 1.

[6] Vol. i 260-262. [7] Vol. v 348, 423, 495-497.

[8] Ibid 428-433, 438-441. [9] Ibid 450-454, 493. [10] Vol. vi 243.

This phenomenon is, as we shall now see, apparent in Blackstone's treatment of these direct prerogatives.

(2) *The direct prerogatives.*

The fact that the prerogative is limited " by bounds certain and notorious " is stated by Blackstone in the first few lines of his chapter on the prerogative.[1] The prerogative, he says, is no longer regarded as partaking of those *arcana imperii*, about which James I considered that it was not fitting that the tongues of lawyers should dispute.[2] He vouches Bracton and Fortescue for the proposition that it is subject to the law and therefore limited by the law.[3] At the same time the prerogative confers very wide powers upon the King. In the sphere of foreign affairs he is the representative of the nation,[4] and, in domestic affairs, his prerogative supplies the executive government with its authority.[5] " The power of the Crown," said George Lyttelton in 1747,[6]

when acting within its due bounds, properly restrained and confined by law and by Parliament, is the authority of the whole commonwealth. It is not an interest set up in the king against that of his people. No, the power of the Crown is only a name for the executive part of the government: it is the vigour and energy of the whole state, which acts for the benefit of all its members; though, in the language of the law, the exertion of it is called the act of the Crown.

Within the sphere of these powers the authority of the Crown is absolute, that is, the Crown has an absolute discretion.

He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences he pleases: unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary; declaring that thus far the prerogative shall go and no further.[7]

[1] " It was observed in a former chapter that one of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the king's prerogative by bounds so certain and notorious that it is impossible he should ever exceed them, without the consent of the people on the one hand; or without, on the other, a violation of that original contract, which in all states implicitly, and in ours most expressly, subsists between the prince and the subject," Comm. i 237; for Blackstone's views as to, and treatment of, the original contract see below 366 n. 7, 368, 528-529.

[2] Comm. i 237-238.

[3] Ibid 238-239; for Bracton's views see vol. ii 252-256; for Fortescue's views see ibid 441, 571; naturally they had played an important part in the constitutional controversies of the seventeenth century, vol. v 430, 436; vol. vi 42, 46, 53, 101-103.

[4] Comm. i 252.

[5] " The king of England is therefore not only the chief, but properly the sole, magistrate of the nation; all others acting by commission from, and in due subordination to him," ibid i 250; below 453-455.

[6] Parlt. Hist. xiv 49; similarly Lord Thurlow, in the course of a speech in 1779 on the right of the East India Co. to their territorial acquisitions, said that, " the Crown represented the state, and held whatever was thus acquired in trust for the nation," ibid xx 661.

[7] Bl. Comm. i 250.

A well-known passage in Bagehot's *English Constitution* shows that, in the nineteenth century, the ambit of the prerogative was as large as when Blackstone wrote.[1]

All these powers were "wisely placed in a single hand by the British constitution for the sake of unanimity strength and dispatch"; [2] and the person in whose hands they were placed was therefore given

certain qualities, as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation. For, though a philosophical mind will consider the royal person merely as one man appointed by mutual consent to preside over many others, and will pay him that reverence and duty which the principles of society demand, yet the mass of mankind will be apt to grow insolent and refractory, if taught to regard their prince as a man of no greater perfection than themselves.

Therefore

the law ascribes to the king . . . certain attributes of a great and transcendent nature, by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government.[3]

He is thus a sovereign. That means first, that he is pre-eminent over all in his realm; and, secondly, that his realm is, as statutes of Henry VIII declare, "imperial"—a reminiscence from the political ideas of the Middle Ages, which signifies that he and his kingdom "owe no kind of subjection to any other potentate on earth," and are subject to no earthly jurisdiction.[4] He can neither do nor think wrong.[5] In him can be no negligence or laches, "and therefore no delay will bar his right." [6] He never dies—"Henry, Edward or George may die; but the King survives them all." [7]

We have seen that these qualities of sovereignty, perfection, and immortality were the product of the legal theories of the Tudor period.[8] We have seen that the King, thus endowed with supernatural qualities, might easily have become, like many of his foreign contemporaries, the sovereign power in the state; [9]

[1] "Not to mention other things, the queen could disband the army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men); she could dismiss all the officers from the General Commanding in Chief downwards; she could dismiss all the sailors too; she could sell off all our ships of war and all our naval stores; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a peer; she could make every parish in the United Kingdom a 'university'; she could dismiss most of the civil servants; she could pardon all offenders," English Constitution (2nd ed.) xxxviii.

[2] Comm. i 249.

[3] Ibid 241.

[4] Ibid 241-242; for these mediæval ideas see vol. i 588-590; vol. ii 121-122, 127-128; vol. iv 18-19, 190-191.

[5] Bl. Comm. i 246.

[6] Comm. i 247-248; above 355.

[7] Comm. i 249.

[8] Vol. iv 202-203, 206-208.

[9] Vol. vi 20-29.

but that the result of the constitutional controversies of the seventeenth century had been to negative this conclusion.[1] The King was the head and representative of the state, his prerogative was the source of the executive power of the central government of the state, but he and his prerogative were not the sovereign power in the state.[2] But we have seen that this result had been effected with the minimum of legal change, so that all these supernatural qualities were still attributed to the King.[3] Blackstone truly represented the conservative rationalism of the eighteenth century, when he expounded and justified them as an important aid to government, in that they increased men's reverence for that government.[4] Here again Bagehot in the nineteenth century reinforces Blackstone's conclusion:

> Royalty is a government in which the attention of the nation is concentrated on one person doing interesting actions. A Republic is a government in which that attention is divided between many, who are all doing uninteresting actions. Accordingly, so long as the human heart is strong and the human reason weak, royalty will be strong because it appeals to diffused feeling, and Republics weak because they appeal to the understanding.[5]

It is one of the great weaknesses of most democratic governments that they despise the appeal to the heart and imagination which is made by a monarchical government, and by the pomp and circumstance which surround a monarch; and that, reasoning logically from the false premise of the possession by its citizens of an equality of understanding, and the false assumption of the existence amongst them of a high level of understanding, they attempt to justify all the acts of government by an appeal to the very limited and shortsighted measure of understanding, which is in fact vouchsafed to them—to the great detriment of the first essentials of all government, continuity and stability.

On the other hand, it must be admitted that the gradual and continuous development of the law as to the prerogative, which allowed the retention of the mystical doctrines of the Tudor and Stuart lawyers, and their attribution to a King whose prerogative had been subjected to the law, tended to introduce certain doubts as to the ambit of prerogative, which have lasted long in the law. It was an opinion held by many in the eighteenth century that the Crown had extraordinary and indefinite powers to act for the good of the state in an emergency. This theory was maintained by Lord Hardwicke in 1739;[6] by his

[1] Vol. vi 203-208; 230-231.
[2] Ibid 242-243; vol. ix 5-7.
[3] Ibid.
[4] Above 363.
[5] English Constitution 39.
[6] "By the very nature of our constitution, the Crown has during the recess of Parliament, a sort of dictatorial power to take care 'ne quid detrimenti respublica

son Charles Yorke in 1754;[1] and in 1778 Lord Camden's defence of the legality of the proclamation of 1766, which laid an embargo on all ships, was based upon it.[2] But, though the theory that an extraordinary prerogative existed thus lingered on as a survival, it was hardly reconcilable with the principles of constitutional law which had been established by the Revolution. Chatham admitted that the proclamation of 1766 was illegal, and that an Act of Indemnity was necessary:[3] Blackstone gives no countenance to the theory; and in 1780, in the debate on the Gordon riots, Lords Mansfield and Thurlow by implication condemned it.[4] We shall see[5] that they stated the law, now generally accepted,[6] that the Crown's power to act in an emergency is not a prerogative power, but a common law power, vested not only in the King but in all magistrates and even in private citizens, which gives them the right, and places upon them the duty, of using the amount of force which is necessary to suppress riot or rebellion. But we shall see that this view of the law as to the basis of the power to suppress riots and rebellions was not immediately accepted; and that the idea that the Crown had an emergency power to proclaim martial law, and to act under such a proclamation, lingered on till the nineteenth century.[7] In fact I think that it would be true to say that it is the discussion of this so-called martial law

capiat'; and in consequence of this power, his majesty may augment his forces, both by sea and land, if it should become absolutely necessary, and he may concert such measures as any sudden exigency may require, without a previous authority from Parliament for that purpose," Parlt. Hist. x 1384.

[1] "If I rightly understand what is meant by prerogative, it is a power always lodged by our constitution in the Crown, something like that power given by the Roman republic to their consuls upon any sudden and dangerous emergency, 'ut dent operam ne quid respublica detrimenti capiat.' . . . According to this opinion when it becomes necessary for the public safety to exercise any act of power not warranted by our statute or common law, and the emergency is so sudden, and the danger so pressing, as to admit of no delay, the king may then exercise that act of power by virtue of his prerogative," Parlt. Hist. xv 271.

[2] "The fact was, the harvest had failed throughout Europe. . . . There was the strongest reason to apprehend that the consequence would be a famine within the kingdom. A council was immediately called, as without some speedy remedy, a dearth was looked on to be inevitable: for no Parliament was then sitting or likely to sit for forty days. . . . It was resolved to issue a proclamation, laying an embargo on shipping, and preventing any corn from being exported. . . . I looked upon it to be a case of necessity which justifies the interposition of the prerogative between the laws and the people; a right to preserve, not to enslave or destroy; a right I shall ever maintain the constitutional exercise of. . . . As soon as Parliament met an indemnity was proposed; for my part I was against it; because[thought it unnecessary. . . . The issuing of the proclamation was a strictly justifiable act of prerogative, an act of prerogative not only warranted by particular necessity, but supported upon general principles," Parlt. Hist. xix 1247-1248.

[3] Camden said in 1778, "he well recollected in the course of the debate, when his lordship (Chatham) was pressed for his opinion, his answer was, 'If I must speak, I think the proclamation was illegal'," Parlt. Hist. xix 1248.

[4] Parlt. Hist. xxi 694-697, 736-739.

[5] Below 707-708.

[6] Below 709, 712-713.

[7] Below 710-712.

in the nineteenth century, which has at length got rid of the view that, in an emergency, the Crown has prerogative powers of indefinite extent—a view which was due historically partly to the fact that in the sixteenth and seventeenth centuries the prerogative had become the executive power in the state,[1] partly to the mystical doctrines about the prerogative which had been incorporated into English law in those centuries,[2] and partly to the gradual way in which the subjection of the prerogative to the law had been brought about.[3]

Though the King's prerogative is limited and defined by the law, we have seen that the law assigns to him attributes which add to his dignity, and to his prerogative the large powers needed by the executive government of a modern state. But it is possible that these large powers may be used oppressively. What remedies has the law provided in such a case? The answer is that the law has provided the petition of right as a remedy for certain specific injuries to private persons, and the principle of ministerial responsibility to the law as a remedy for public oppression.[4] The latter principle is safeguarded by the independence of the judiciary, and its separation from the Legislature and the executive; for "nothing is more to be avoided in a free constitution than uniting the provinces of a judge and a minister of state." [5]

For ordinary cases, then, the law provides the subject with remedies both for private injuries and public oppression. At the same time it gives to the King, as the representative of the nation, the powers needed to afford that protection to individuals, without which there can be no civil liberty.[6] It is only when "the law proves too weak a defence" that the individual can have any right to resist.[7] Then indeed such

[1] Above 340, 364.
[2] Vol. iv 204-207; vol. vi 20-23.
[3] Ibid 241-243; vol. ix 4-7.
[4] Comm. i 243-244.
[5] Ibid 269; Blackstone's prophecy that if France ever recovered its liberty, it would be owing to the efforts of the Parléments, was falsified by the event; but, when he was writing, the course which events were then taking in France made it probable, see above 17-18.
[6] "Civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society: society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey," Bl. Comm. i 251.
[7] "The power of the Crown would indeed be but a name and a shadow, insufficient for the ends of government, if, when its jurisdiction is clearly established and allowed, any man or body of men were permitted to disobey it in the ordinary course of law: I say in the *ordinary* course of law; for I do not now speak of those *extraordinary* recourses to first principles, which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence against the violence of fraud or oppression," ibid i 250-251; I think that M. Halévy, History of the English People in 1815, 130-133, gives much too exaggerated an account of what he calls the right to rebellion; the danger of riot was, it is true, an ever-present danger; but the law recognized no *right* of rebellion—only a right to resist when the law itself was overborne by violence.

a right may exist. The Bill of Rights had provided that "the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law"; [1] and this provision is, as Blackstone says,[2] "a public allowance under due restrictions of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." In fact the inadequacy of the police force at the disposal of the government [3] made the danger of unlawful resistance a very real danger, and therefore made the government nervous of adopting a policy which aroused serious opposition.[4] But in law the occasions in which the right to resist, as thus limited and defined, can arise, must be rare, by reason of the protection against oppression which is given by the powers of Parliament. For the prerogative is kept in check by the right which the Houses of Parliament have "of remonstrating and complaining to the King even of those acts of royalty, which are most properly and personally his own; such as messages signed by himself, and speeches delivered from the throne"; [5] and the King's name must never be so used as "to awe their proceedings or to overbear their debates." [6] It is true indeed that the wrongs complained of are not imputed to the King, but to his ministers; and that the King must always be mentioned with respect. But his ministers can always be called to account, and, if necessary, impeached.[7] "Thus, the King may make a treaty with a foreign state, which shall irrevocably bind the nation; and yet, when such treaties have been adjudged pernicious, impeachments have pursued those ministers, by whose agency or advice they were concluded." [8] This sentence accurately states the doctrine of the late seventeenth and early eighteenth centuries; but it was a little archaic when Blackstone was writing.[9] It was coming to be recognized, as the Long Parliament had long ago pointed out,[10] that an impeachment is a criminal prosecution, and that a mistake in policy is not a criminal offence. The political practice of Blackstone's day recognized that the disapproval of Parliament

[1] 1 William and Mary St. 2 c. 2 § 1.
[2] Comm. i 144. [3] Above 144.
[4] Lord Hardwicke said in 1753, "however much the people may be misled, yet in a free country, I do not think an unpopular measure ought to be obstinately persisted in. We should treat the people as a skilful and humane physician would treat his patient: if they nauseate the salutary draught we have prescribed, we should think of some other remedy, or we should delay administering the prescription till time or a change of circumstances has removed the nausea," Parlt. Hist. xv 102.
[5] Bl. Comm. i 246. [6] Parlt. Hist. viii 785 (1730).
[7] Comm. i 246-247, 251-252. [8] Ibid 251-252.
[9] Vol. i 383-384; vol. vi 261-262.
[10] The Grand Remonstrance § 198, cited vol. i 384.

necessitated resignation, and that criminal prosecutions were both out of place and unnecessary.[1]

Blackstone in effect admits that in fact the Crown or the Houses of Parliament might be guilty of oppression; but he points out that the law refuses to make any such supposition.[2] Both the Crown and the Houses of Parliament are invested with parts of the "supreme power"; and the law is "incapable of distrusting those whom it has invested with any part of the supreme power," "since in such cases the law feels itself incapable of furnishing any adequate remedy."[3] Such oppression is out of the reach of "any stated rule or express legal provision"[4]—it is a case for a revolution such as occurred in 1688; and Blackstone wisely leaves "to future generations, whenever the necessity and safety of the whole shall require it, the exertion of those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish."[5]

The prerogative, then, subject to the control of the law and of Parliament, gives the King the powers needed to act as the executive government of the state, and as the representative of the nation. What is the content of these powers? Blackstone makes a division, as applicable now as when he wrote, into the two main heads of powers exercisable in relation to foreign nations, and powers exercisable in relation to domestic affairs.

Foreign affairs.

The powers of the Crown in relation to foreign affairs have connections both with constitutional law and with international law; for they come at the meeting-place of these two branches of law. Of the development of international law during this period I shall speak later.[6] At this point I shall follow Blackstone, and deal with the rules of international law only so far as they are part of or related to constitutional law.

Since "with regard to foreign concerns the King is the delegate and representative of his people," "what is done by the royal authority, with regard to foreign powers, is the act of the whole nation."[7] It was therefore through the action of the Crown that English law was introduced to many topics which touched upon the new international law, and was forced to take some account of its rules. It was through this contact that new developments in certain parts of the public law of the English state were then taking place, and have continued to take place.

In the first place, the King "has the sole power of sending

[1] Above 76; below 636.
[2] Comm. i 244.
[3] Ibid.
[4] Ibid i 244.
[5] Ibid 245.
[6] Vol. xii 630-639.
[7] Bl. Comm. i 252.

embassadors to foreign states and receiving embassadors at home." [1] It was therefore necessary for English law to come to some conclusions as to the controverted question of the immunities of these ambassadors and their suites. We have seen that international lawyers were very uncertain as to the extent of these immunities in the sixteenth and early seventeenth centuries; [2] and we shall see that this uncertainty was not cleared up till the eighteenth century.[3] English law took a restrictive view of their immunities both in the sphere of criminal and civil law. According to Coke, they could be punished if they committed offences against the law of reason or nature, and therefore for treason, if they plotted the death of the King to which they were accredited; but if they committed any other kind of treason they could not be punished, but must be sent to their own countries; and, similarly, they were liable upon contracts "that be good *jure gentium*." [4] With respect to criminal liability, Hale [5] and Foster [6] agreed with Coke as to the extent of an ambassador's immunities. It would seem therefore that in the seventeenth century the common law gave very small recognition to an ambassador's immunities, so that the ambassador was obliged to rely on the Crown's prerogative powers to protect him from proceedings in the English courts.[7] In fact both this and other matters connected with the law governing international relations were, as they still are,[8] closely related to the prerogative, and are, on that account, regarded to a large extent as matters of state, and therefore outside the ken of the common law. As late as Lord Nottingham's time matters connected with treaties, and matters of state connected with foreign policy, because they were considered to be peculiarly within the province of the Council, were regarded as unfit to be discussed in the courts of common law; [9] and the Chancery, on this ground, assumed

[1] Bl. Comm. i 253.

[2] Vol. v 45-46; on the whole subject see F. R. Adair, The Exterritoriality of Ambassadors in the 16th and 17th Centuries, chaps. ii-v, vii, viii. Mr. Adair, op. cit. 152-153, has given good reasons for thinking that my statement, vol. v 46, that the case of Don Pantaleon Sa settled that a member of an ambassador's suite was amenable to the criminal law, is incorrect—though it came to be cited as a precedent for that view, see below n. 5.

[3] Below 370-372.

[4] Vol. v 45-46; Coke, Fourth Instit. 153; Bl. Comm. i 253-254.

[5] P.C. i 99-100; note that Hale cites the case of Don Pantaleon Sa as authority for the rule that the servants of an ambassador are liable criminally.

[6] "For murder and other offences of great enormity, which are against the light of nature and the fundamental laws of all society, the persons mentioned in this section [ambassadors] are certainly liable to answer in the ordinary course of justice, as other persons offending in the like manner are," Discourse I 188.

[7] Adair, Camb. Hist. Journal ii 291-294. [8] Below 396, 398; vol. xi 269.

[9] Weymberg v. Touch (1669) 1 Ch. Cas. 123; Troner v. Hassold (1670) ibid 173; Blad v. Bamfield (1674) 3 Swanst. at pp. 605-606; Harrison Moore, Act of State in English Law 24-28.

jurisdiction to issue injunctions against proceedings in those courts.[1]

Lord North, Lord Nottingham's successor, denied that the court of Chancery could thus interfere in matters of state.[2] The Crown was therefore left with very little power to give protection by means of its prerogative to the rights recognized by international law, or to enforce the duties which it imposed; and after the Revolution the prerogative afforded an even more inadequate protection.[3] This fact was made apparent by the episode of the arrest of the Czar's ambassador for a debt in 1708.[4] The persons concerned in the arrest were prosecuted and tried; but whether or not they had committed any crime was never determined.[5] It was in fact so doubtful whether they could be held to have committed a crime [6] that it was thought necessary to provide that, for the future, all persons concerned in suing out or prosecuting writs or process against ambassadors, public ministers, or their servants, should be criminally liable.[7]

The statute also provides that all writs and processes, whereby such persons might be arrested or their goods distrained, were to be void.[8] It thus gives them immunity from civil process, subject, however, to two provisos.[9] In the first place no trader, who is in the service of an ambassador or public minister, is to take any benefit by the Act. This proviso applies only to the servants of ambassadors or public ministers, and not to the ambassadors or public ministers themselves, so that they do not lose their immunity by trading; and the term "public minister" includes the members of an ambassador's diplomatic staff.[10] In the second place, no person can be proceeded against for the arrest of the servant of an ambassador or public minister, unless the

[1] Blad v. Bamfield (1674) 3 Swanst. at p. 607.

[2] Anon. (1682) 1 Vern. 120, where, on it being urged "that the Chancery was a Court of State," North L.K. said, "I do not apprehend the Chancery to be in the least a Court of State: neither can I grant an injunction in any case, but when a man has a plain right to be quieted in it"; Harrison Moore, op. cit. 28.

[3] Camb. Hist. Journal ii 294.

[4] For an account of this episode see Bl. Comm. i 255-256; Adair, Exterritoriality of Ambassadors 87-88, 237-238.

[5] "At their trial before the lord chief justice they were convicted of the facts by the jury, reserving the question of law, how far these facts were criminal, to be afterwards argued before the judges; which question was never determined," Bl. Comm. i 255.

[6] Vol. v 45-46; Adair, op. cit. 87-88.

[7] 7 Anne c. 12 § 4; this section provided that such persons were to be "deemed violators of the laws of nations, and disturbers of the public repose, and shall suffer such pains penalties and corporal punishment as the said Lord Chancellor, Lord Keeper, and the said Chief Justices, or any two of them shall judge fit to be imposed and inflicted."

[8] Ibid § 3. [9] § 5.

[10] Barbuit's Case (1737) Cases t. Talbot 281; Taylor v. Best (1854) 14 C.B. at p. 519 *per* Jervis C.J.; the person privileged in this case was second secretary of the legation of the King of the Belgians.

servant's name is registered with the secretary of state. Obviously this proviso does not make registration a condition precedent to immunity: its absence merely affords protection to a bailiff who has made an arrest.[1] The statute in no way affects the right of an ambassador or other public minister to appear as a plaintiff in the courts;[2] and we have seen that, in the seventeenth century, the court of Admiralty, when sitting as a prize court, often heard suits between the ambassadors of the powers to which the captor and the prize belonged.[3] But later cases have recognized that an ambassador who sues must, like a foreign sovereign who sues, be taken to submit to and be bound by the rules of English law, both substantive and adjective.

Whether or not this statute affected the immunity of ambassadors and their servants in the sphere of criminal law is very doubtful.[4] The case of Mr. Gallatin's coachman in 1827 would seem to show that it gives no immunity to the servants of ambassadors.[5] But, as early as the sixteenth century, the opinion was gaining ground that ambassadors and public ministers were absolutely immune, even if they had plotted treason against the state to which they were accredited.[6] In such a case, indeed, the ambassador might be temporarily detained and his house and papers searched; but he could not be put on his trial for treason.[7] In the eighteenth century this immunity of the ambassador was well established;[8] and it was based upon the principle that the international law which gave this immunity was part of the law of England.[9] The reception of the rules of international law on

[1] Seacomb v. Bowlney (1743) 1 Wils. K.B. 20; Heathfield v. Chilton (1767) 4 Burr. at p. 2017; Hopkins v. De Roebeck (1789) 3 T.R. 79.

[2] Phillimore, International Law (3rd ed.) ii 224-225.

[3] Select Pleas of the Admiralty (S.S.) ii, xvii 170, cited vol. i 564; see Legatus Hispanciae v. Plage (? 1611) Moore 814; Le Spanish Embassador v. Pountes (1612) 1 Roll. Rep. 133; Don Diego Serviente D'Acuna v. Gifford (1617) Moore 850; Don Diego Serviente de Acuna v. Joliff and others (n.d.) Hob. 78.

[4] Adair, op. cit. 88-89; in the United States an identical Act has been held to give criminal as well as civil immunity.

[5] Hall, International Law (6th ed.) 177, 179.

[6] Vol. v 45; Phillimore, International Law (3rd ed.) ii 203-204.

[7] "It is not meant however to convey the impression either that the ambassador is to escape without punishment, or that the State in which he is discharging his functions is powerless to resist his open violence, or to stay his secret machinations against her public safety, or to redress the rights of a subject whom he may have criminally injured. It is the duty and right of the injured State, under these circumstances, to oppose force by force, and in the event of secret machinations, to secure the person of the ambassador and remove him from her borders, and in the case of the *privatum delictum*, to insist upon his being tried by the tribunals, or the proper authorities of his own country," ibid ii 204; see the case of Gyllenburg, the Swedish ambassador in 1717, ibid ii 210.

[8] It was supported by Grotius, Wicquefort, Zouche, Bynkershoek, and Vattel, ibid ii 203.

[9] Barbuit's Case (1737) Cases t. Talbot 281; and see Lord Mansfield's account of that case in Triquet v. Bath (1764) 3 Burr. at p. 1481, cited below 372 n. 7; and

this matter had, in Blackstone's opinion, overruled the older common law rules.[1] And, if the reasoning in *Taylor v. Best* be adopted, this immunity would seem to apply to all members of the diplomatic staff,[2] though not to the domestic servants of ambassadors and public ministers.[3] Later cases have recognized that the similar immunity of foreign sovereigns—a subject not mentioned by Blackstone—rests upon a similar reception of the rules of international law.

In fact, in the course of the eighteenth century, the view that the rules of international law were part of the law of England had come to be very widely held. Blackstone argued in 1764 that the statute of 1708 made no change in the law, "for that ambassadors and their attendants were, by the general law of nations, entitled to the same privilege"; [4] and Lord Mansfield approved his argument. Lord Mansfield said that "the Act was not occasioned by any doubt whether the law of nations, particularly the part relative to public ministers was not part of the law of England; and the infraction criminal; nor intended to vary an iota of it." [5] He based this conclusion on the wide premise that the law of nations was part of the law of England, citing as his authorities dicta of Holt, Talbot, and Hardwicke.[6] In the later case of *Heathfield v. Chilton* he made the same assertion, and added that an Act of Parliament cannot alter the law of nations.[7] He may have had the same idea of the over-riding

his account of it in Heathfield v. Chilton (1767) 4 Burr. at p. 2016; as Professor Brierly has pointed out, L.Q.R. li 31, the modern view is that international law is not a part, but a source, of English law, see West Rand Central Gold Mining Co. v. R. [1905] 2 K.B. at pp. 406-408.

[1] "However these principles [the principles laid down by Coke] might formerly obtain, the general practice of this country, as well as the rest of Europe, seems now to pursue the sentiments of the learned Grotius, that the security of ambassadors is of more importance than the punishment of a particular crime," Comm. i 204, and cp. iv 67, 70-71.

[2] (1854) 14 C.B. at p. 519; above 370 n. 10.

[3] Above 371 and n. 6.

[4] Triquet v. Bath (1764) 3 Burr. at pp. 1478-1479; see S.C. 1 W. Bl. 472-474 for a fuller report of Blackstone's argument.

[5] 3 Burr. at p. 1480.

[6] "Lord Talbot declared a clear opinion—'that the law of nations, in its full extent was part of the law of England,'—'that the Act of Parliament was declaratory, and occasioned by a particular incident,'—'that the law of nations was to be collected from the practice of different nations and the authority of writers.' . . . I was counsel in this case; and I have a full note of it. I remember, too, Lord Hardwicke's declaring his opinion to the same effect; and denying that Lord Chief Justice Holt ever had any doubt as to the law of nations being part of the law of England, upon the occasion of the arrest of the Russian ambassador," ibid at p. 1481. Possibly it was on this ground that the attorney-general gave it as his opinion in 1762, that a libel on a foreign sovereign was a criminal offence, Calendar of Home Office Papers 1760-1768, 191-192.

[7] (1767) 4 Burr. at p. 2016; probably Lord Mansfield did not intend to assert that the English courts could disregard an Act of Parliament which altered the law of nations, but only that the law of nations, being, as Blackstone said (Comm. iv 66), dependent on principles of natural justice, could not be affected by an Act of Parlia-

effect of these rules of the law of nations in his mind, when he said in *Campbell v. Hall* that, though the King can make new laws for a conquered territory, he cannot " make any new change contrary to fundamental principles " [1]—though it is probable that he was then thinking principally of the principles of the common law.[2]

Blackstone makes no such sweeping assertions as to the reception of the rules of international law and their binding force in England, either in his argument in *Triquet v. Bath*, or in the first volume of his Commentaries.[3] But it is clear from a passage in the fourth volume of the Commentaries [4] that he agreed with this view. It is a view which is historically incorrect; but, if Mansfield is right in his report of Holt's, Talbot's and Hardwicke's dicta,[5] it was in accordance with the prevailing trend of legal opinion. In fact this large question of the relation of English law to international law was then a very new question; and we shall see that Mansfield's and Blackstone's views represent only one school of thought upon a problem which, even now, is by no means completely settled.[6]

In the second place, the King has the sole power of making

ment. If he meant more than this his dictum can be regarded, as Dean Pound has said, as " the last echo in England of Coke's doctrine in Bonham's Case," 21 H.L.R. 395; for Bonham's Case see vol. ii 442, vol. v 475; or Lord Mansfield may have been guilty of the same confusion of thought as Blackstone when he said (Comm. i 41) that no human laws contrary to the law of nature were of any validity, and yet, admitted (Comm. i 160-161) the supremacy of Parliament.

[1] " If the king . . . has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles," Campbell v. Hall (1774) 1 Cowp. at p. 209; see Harrison Moore, Act of State in English Law 82.

[2] Below vol. xi 238.

[3] " In consequence of this statute, thus declaring and enforcing the law of nations, these privileges are now held to be part of the law of the land, and are constantly allowed in courts of common law," Comm. i 256; I cannot agree with Mr. Adair, op. cit. 240-241, that this passage proves that Blackstone did not hold the historically incorrect view that international law as a whole, or that that part of it relating to ambassadors, was part of the law of England, apart from the statute of 1708; in this passage he is thinking primarily of the effect of the statute on the practice of the English courts, see his argument in *Triquet v. Bath*, above 372, as to the privileges of ambassadors, and the next note for his views as to the relation of international law as a whole to English law.

[4] " The law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world," Comm. iv 67.

[5] Above 372 n. 7.

[6] Above 371 n. 10; in particular the question how far in English law an ambassador's immunity extends, beyond the freedom from civil and criminal process secured by the Act of Anne, is a question not wholly free from doubt, Adair, op. cit. 242-243

treaties. Blackstone sets no limit to this power—"whatever contracts he engages in, no other power in the kingdom can legally delay, resist, or annul." [1] We have seen that the only remedy for an abuse of this power, which Blackstone recognizes, is the impeachment of the ministers who have made the treaty [2] —a remedy which was not only practically obsolete when he was writing, but was also quite inappropriate; for it is difficult to see how the making of the most impolitic treaty can be a criminal offence.[3] In fact we shall see that Blackstone was not quite accurate when he stated that this prerogative was unlimited; and that, when he wrote, English constitutional law had imposed some limitations.[4]

In the third place, Blackstone discusses several matters relative to war.

The King has the sole prerogative of making peace and war.[5] Those who begin an unauthorized war are robbers and pirates; [6] and those who commit acts of hostility upon any nation allied to England are guilty of an offence against the law of nations, and are punishable by English law.[7] To make it clear that the war is not the unauthorized act of private persons, but is regularly begun, a declaration of war is necessary.[8] This view was once generally held; but it had become antiquated in Blackstone's time.[9]

Incident to the power to make war was the power to issue letters of marque and reprisal.[10] Reprisals were a typically mediæval remedy. They rested, as we have seen, on this principle: if a citizen of community A had been wronged by a citizen of community B, and could not get redress, he might get from the government of his state the right to get compensation from the property of any citizen of community B whom he could find.[11] In England they had been abolished, as between Englishmen, in 1275; [12] and abroad mercantile custom made, first for their restriction, and then for their abolition.[13] But in England, though they had been abolished as between Englishmen in 1275, they could still be used as against foreigners, unless the right was barred by treaty with a particular foreign state; [14] and, under a statute of Henry V's reign, letters of reprisal must

[1] Comm. i 257. [2] Above 367. [3] Vol. i 383-384.
[4] Below 401; vol. xi 253, 268. [5] Comm. iii 257. [6] Ibid.
[7] Comm. iv 68-70; for the mediæval statutes as to breach of truces and safe-conducts see ibid, and vol. ii 473-474; the only one of them in force when Blackstone wrote was 31 Henry VI c. 4.
[8] Bl. Comm. i 257-258. [9] Vol. v 37 n. 1.
[10] Bl. Comm. i 258; on the whole subject see F. R. Sanborn, Origins of Early English Maritime and Commercial Law 224-234, 317-319.
[11] Vol. v 73-74.
[12] 3 Edward I c. 23; vol. ii 389; vol. v 74.
[13] Ibid 37-38. [14] Sanborn, op. cit. 230, 317-319.

be issued to subjects aggrieved by acts done by foreigners contrary to the terms of a truce.[1] Though they continued to be issued in the sixteenth century,[2] it began to be seen that they were not only commercially objectionable, but also that the idea on which they rested was out of harmony with the position and the responsibility which had then been assumed by the ruler of a territorial state, and with the principles of the new international law, which were being evolved to regulate the relations between these states.[3] Hence the practice of granting letters of reprisal, allowing private persons to right their own wrongs, had begun to be discouraged by treaty,[4] and, consequently, had fallen into disuse nearly a century before Blackstone wrote.[5] Instead, the state had assumed a right, which rested, to some extent, upon an idea analogous to the idea upon which the mediæval right to enact reprisals rested, but which was more consonant to the new ideas of the relations between modern territorial states. This was the right in time of war to issue commissions to privateers, called letters of marque, which allowed those to whom the commissions were issued to prey upon the enemy's commerce.[6] These commissions were frequently issued during the latter part of the seventeenth, the eighteenth, and first half of the nineteenth centuries ; [7] and the conditions of their issue were, to some extent, regulated by statute.[8] When privateering was abolished by the Declaration of Paris in 1856, the last trace of the ideas upon which the old custom of reprisals had rested, disappeared.

Another power, incident to the power to levy war, was the power to give safe-conducts or passports to alien enemies, allowing them to come into the realm or to carry on trade.[9] Magna Carta provided for the case of alien enemy merchants present in England at the outbreak of a war, by the same clause as that which gave to foreign merchants free ingress into and egress from England except in time of war.[10] That clause provided that the treatment of enemy alien merchants should be determined by the manner in which English merchants were treated

[1] 4 Henry V c. 7 ; Bl. Comm. i 259, and Christian's note.
[2] Vol. v 47. [3] Ibid 38, 47.
[4] Marsden, Law and Custom of the Sea (Navy Records Soc.) ii xvi.
[5] "With the exception of letters of reprisal against Hamburg . . . and one issued in Charles II's reign, which was afterwards recalled, no letters of reprisal properly so-called have been found of later date than those of the Commonwealth," ibid ii xvii.
[6] Bl. Comm. i 259, and Christian's note.
[7] For the Instructions issued to privateers between 1649 and 1780 see Marsden, Law and Custom of the Sea (Navy Records Soc.) ii 403-435 ; vol. xii 655, 673.
[8] 29 George II c. 34 ; 19 George III c. 67 ; 24 George III c. 47 § 10.
[9] Bl. Comm. i 259-260.
[10] § 41 (1215), cited vol. ix 94 n. 2 ; see below 390 for a qualification inserted in this clause in 1225.

by the enemy country.[1] As to alien friends, we have seen that their position while in England tended to be assimilated in many respects to the position of natives, with the result that the former wide and indefinite prerogative powers which the Crown formerly possessed over them tended to disappear.[2] With the prerogative rights which the Crown had over them, which it had not got over its subjects, I shall deal later.[3]

The wide prerogatives of the King in relation to foreign affairs were very little controlled by statute. The mediæval statutes [4] were either repealed or obsolete; and such eighteenth-century statutes as related to these prerogatives operated either to extend them or to give them greater precision. Thus, the Crown was given extended powers to prevent British subjects from enlisting as soldiers in the service of foreign princes,[5] and to prohibit loans to foreign princes.[6] Extended powers were also given to grant commissions to privateers; [7] and, after the close of the American war of independence, to make regulations as to trade with America.[8] The statute of 1708 settled, as we have seen, the law as to the immunities from civil process of ambassadors and their suites.[9] During the eighteenth century, there was no such encroachment by the Legislature on the sphere of these prerogatives as was taking place in respect of some of those prerogatives which relate to domestic affairs; and this phenomenon is even more true of the course of legislation during the nineteenth century.

Domestic affairs.

Blackstone sums up the King's prerogatives in domestic affairs under the following six heads: (1) the position of the King as a part of the Legislature; (2) his powers in relation to national defence; (3) his position as the fountain of justice; (4) his position as the fountain of honour; (5) his powers as the arbiter of commerce; (6) his position as the head of the national church.[10] I shall deal first with the King's prerogatives in relation to national defence and to commerce, since some of the aspects of these two heads of prerogative are related to the

[1] "Si tales inveniantur in terra nostra in principio guerrae, attachientur sine dampno corporum et rerum, donec sciatur a nobis vel capitali justiciario nostro quomodo mercatores terrae nostrae tractentur, qui tunc invenientur in terra contra nos gwerrina; et si nostri salvi sint ibi, alii salvi sint in terra nostra," § 41 (1215); for Blackstone's and Montesquieu's comments on this clause see Comm. i 260-261; for the reasons for the enactment of this clause see McKechnie, Magna Carta (2nd ed.), 399-402, 403-404; Sanborn, op. cit. 371-372.

[2] Vol. ix 93-98. [3] Below 393-400. [4] Vol. ii 473-474.

[5] 12 Anne St. 2 c. 11; 9 George II c. 30; 29 George II c. 17; Bl. Comm. iv 101.

[6] 3 George II c. 5. [7] Above 375 n. 8. [8] 23 George III c. 39.

[9] 7 Anne c. 12; above 370. [10] Comm. i 261-280.

King's prerogative over foreign affairs. Then I shall deal with the other four heads of prerogative in the order in which they are dealt with by Blackstone.

(1) "The King is considered as the generalissimo, or the first in military command within the kingdom." [1] The Great Rebellion, and the events which had led up to it,[2] had caused Parliament in 1661 to declare expressly that all powers relating to national defence were vested in the King.[3] There can be no doubt of the technical and historical correctness of the terms in which this declaration was made.[4] The declaration runs as follows:

> Within all His Majesty's Realms and Dominions, the sole supreme government command and disposition of the militia, and of all forces by sea and land, and of all forts and places of strength is, and by the laws of England ever was the undoubted right of His Majesty, and His Royal Predecessors, Kings and Queens of England; and both or either of the Houses of Parliament cannot nor ought to pretend to the same.

During the eighteenth century the military forces of the Crown consisted of the militia and the standing army.

The powers of the Crown in relation to the militia had been settled, partly by mediæval statutes, and partly by statutes of the seventeenth century. The effect of these statutes was that no person could be compelled, without the consent of Parliament, to provide soldiers,[5] that no man could be compelled to serve out of his county except in case of invasion,[6] and that volunteers who served out of England must be paid by the King.[7] No troops could be quartered upon householders; and the troops were not, within England, subject to martial law in time of peace.[8] Except in case of invasion, impressment of troops to serve outside the county was illegal.[9] We have seen that, in the latter half of the sixteenth century, there had been some reorganization of the militia, and that it had been placed under the control of lord lieutenants.[10]

[1] Comm. i 262. [2] Vol. vi 140. [3] 13 Charles II St. 1 c. 6.

[4] The Norman kings had successfully asserted the principle that all military service due from tenant to lord was service owed to the King, vol. iii 39; Coke, First Inst. 5, tells us that "no subject can build a castle or house of strength embattelled, etc., or other fortresse defensible . . . without the licence of the king, for the danger which might ensue, if every man at his pleasure might do it."

[5] 25 Edward III St. 5 c. 8; 4 Henry IV c. 13.

[6] 1 Edward III St. 2 c. 5; 4 Henry IV c. 13.

[7] 18 Edward III St. 2 c. 7; 4 Henry IV c. 13.

[8] 3 Charles I c. 1 (the Petition of Right); vol. i 576.

[9] 16 Charles I c. 28, Preamble.

[10] Vol. iv 76; see Clode, Military Forces of the Crown i 33, for the Parliamentary contention in the reign of Charles I that their powers were illegal; there is an echo of this controversy in the clauses of 13 Charles II St. 1 c. 6 § 2, and 15 Charles II c. 4 § 15 giving indemnity to lieutenants who had acted under the King's commission.

The original common law liability of every man between fifteen and sixty to keep arms according to his estate, and to serve when called upon, had been put upon a new basis, first by a statute of Philip and Mary's reign,[1] and, later, by statutes of Charles II's reign.[2] Under Charles II's statutes the liability to supply men, horses, and arms was placed upon the owners of property; and the lord lieutenants and their deputies were empowered to levy a rate for this purpose. The institution of a standing army after the Revolution caused the militia to be neglected.[3] But the rebellion of 1745, and the panic caused by rumours of a projected French invasion in 1756, led to the reconstitution of the militia on a new basis.[4] Each county was required to provide a certain number of men. To get these men, lists of all men between the ages of eighteen and sixty were sent to the lord lieutenant. From these lists the requisite number of men were chosen by ballot. The men so chosen served for three, and after 1786,[5] for five years. The force was officered by the lord lieutenants, the deputy lieutenants, and other principal landowners of each county. They could not be compelled to serve outside the kingdom, nor, except in cases of invasion or rebellion, outside their counties.[6] While on active service they were subjected in 1756 to military law.[7] Blackstone regarded the militia, as thus reconstituted, as "the constitutional security for the public peace, and for protecting the realm against foreign or domestic violence."[8]

We have seen that the constitutional position of the standing army had been settled on its modern basis at the Revolution.[9] Its legality was made dependent on the sanction of Parliament. Parliament each year has given its sanction for a year; and each year has enacted, or given authority to the Crown to enact, a code of rules for its discipline.[10] When Blackstone was writing, this code of rules depended partly on the annual Mutiny Acts, and partly on the common law and statutory powers of the Crown to make articles of war for the government of the army. Our present code of military law derives its authority from the

[1] 4, 5 Philip and Mary c. 2; this statute was repealed by 1 James I c. 25 § 7.

[2] 13 Charles II St. 1 c. 6; 13, 14 Charles II c. 3; 15 Charles II c. 4; Clode, op. cit. i 33-36.

[3] Anson, Law of the Constitution ii Pt. ii (4th ed.) 210.

[4] 30 George II c. 25; Clode, op. cit. i 38-42; the principal Act was amended by 31 George II c. 26; 32 George II c. 20; 33 George II cc. 2, 22, 24; 2 George III c. 20; 4 George III c. 17; these Acts were consolidated in 1786, 26 George III c. 107.

[5] Ibid § 24.

[6] Bl. Comm. i 412.

[7] 30 George II c. 25; Clode, Military and Martial Law 31.

[8] Comm. i 412.

[9] Vol. vi 241.

[10] For the breaks which occurred in the operation of successive Mutiny Acts in William III's and Anne's reigns see Clode, The Military Forces of the Crown i 153, 389-391.

same sources; but, as is the case with many other parts of our constitutional law, the ground covered by express statutory provision has encroached upon the ground formerly occupied by the common law or statutory powers of the Crown.

The first Mutiny Act legalized a standing army within the kingdom in time of peace, and provided for the infliction of the death penalty or such other penalty as a court martial should inflict for certain offences.[1] It seems to have been assumed (i) that all offences committed by soldiers abroad, and (ii) smaller offences committed by soldiers within the kingdom, could still be dealt with by articles of war made by the King.[2] The legality of these articles of war was recognized in the Mutiny Act of 1702, when it was declared that nothing in the Act was to abridge the power of the Crown to make articles of war, erect courts martial, and inflict penalties, as it might have done beyond the seas in time of war before the passing of the Act;[3] and the Crown was given power to erect courts martial within the kingdom to enforce the articles of war in this country, and to try offences against them committed abroad.[4] After the peace of Utrecht the military code was revised, and the death penalty was removed from it—a leniency which, in the opinion of some, contributed to render the rebellion of 1715 more serious.[5] In 1715 a very severe code was enacted. All offenders were made liable to capital punishment, or such other punishment as the court martial might see fit to impose, so that soldiers were made liable to punishment at the caprice of their officers.[6] Moreover, in 1717, the Crown was given power to make articles of war for the army both within the kingdom and abroad, and to erect courts martial to try any crime and to inflict any penalties.[7] There is no wonder that the grant of these wide legislative and judicial powers to the Crown aroused opposition. But the opposition effected little. It only effected two modifications. In 1749 Parliament enacted, what was probably the law before,[8] that, within the United Kingdom, no

[1] 1 William and Mary c. 5.

[2] Clode, Military and Martial Law 22; Military Forces of the Crown i 146.

[3] 1 Anne St. 2 c. 20 § 39; Clode, Military and Martial Law 25.

[4] 1 Anne St. 2 c. 20 §§ 39-41; Clode, Military and Martial Law 25-26; for doubts which had been felt as to the power of the Crown to punish by martial law the offences of soldiers abroad, and other offences besides mutiny, sedition and desertion committed in England, see a letter of Northey the attorney-general S.P. Dom. 1702-1703, 273; in 1702 the judges said that martial law could be exercised in a ship on the high seas for offences committed by land forces on land beyond the sea, ibid 285-286; but a sailor subject to the Naval Discipline Act could not be tried by military court, Calendar of Home Office Papers 1760-1765 306.

[5] Clode, op cit. 26; 12 Anne c. 13.

[6] 1 George I St. 2 c. 34; Clode, Military and Martial Law 27-28.

[7] 3 George I c. 2; Clode, The Military Forces of the Crown i 146-148; Military and Martial Law 29-30.

[8] Clode, The Military Forces of the Crown i 148.

punishment extending to life and limb could be inflicted except for such crimes as had been made thus punishable by the Mutiny Act;[1] and in the same year the offence of refusing to obey a command was qualified by making the offence a refusal to obey a *lawful* command.[2]

It is not surprising that, all through the eighteenth century, the army, thus disciplined, though absolutely necessary for the preservation of the peace,[3] was regarded with the utmost jealousy. Though Blackstone admitted that "the army is now lastingly ingrafted into the British Constitution,"[4] he criticized the arbitrary and uncertain character of the military law which Parliament had authorized; and he thought that some relaxation of the code should be permitted in time of peace.[5] He considered that "no separate camp, no barracks, no inland fortresses should be allowed," because, in the interests of freedom, "the soldiers should live intermixed with the people"[6]—a feeling which was widely shared, as Pitt found in 1786, when the House of Commons, by the casting vote of the Speaker, rejected his proposal to erect fortifications to protect the dockyards at Portsmouth and Plymouth.[7] It is probable that Blackstone was right in thinking that if Parliament had enacted for the army, as it had enacted for the navy, a definite code of rules, much of the arbitrariness and uncertainty, and therefore much of the unpopularity of the army and its military law, would have been obviated.[8] In fact a proposal to take this course was rejected by the House of Lords in 1718.[9] During the nineteenth century this result was gradually attained;[10] and in 1879 the articles of war and many of the provisions of the Mutiny Acts were embodied in the Army Act. The code of military law was thus at length put into the same position as that which the code of naval law had occupied since its introduction in 1661.[11] The results of this elimination of arbitrariness and uncertainty from the military code go far to prove the correctness of Blackstone's opinion.

The Crown's control over the navy has had a different history from its control over the army. Unlike the army, so far from being suspect, the navy has always been regarded, in Blackstone's words, as the "greatest ornament and defence of the country."[12] This difference in the attitude of the country towards

[1] 22 George II c. 5 § 57.
[2] Ibid § 15; Clode, Military and Martial Law 30-31.
[3] Above 144.
[4] Comm. i 421.
[5] Ibid 414-416.
[6] Ibid 413-414.
[7] Clode, The Military Forces of the Crown i 224-225.
[8] Comm. i 415, 420-421.
[9] Clode, The Military Forces of the Crown i 147.
[10] The first Mutiny Act contained ten sections: the last passed in this form in 1878 contained one hundred and ten sections.
[11] Below 381.
[12] Comm. i 417.

the navy was reflected in the law, first as to the discipline of the navy, and secondly, as to the recruitment for the navy.

(i) We have seen that, in the Middle Ages, the Lord High Admiral had certain disciplinary powers over the fleet.[1] When, under the Tudors, a permanent navy was created, the admiral in command issued regulations for its government.[2] As the result of the Petition of Right, these regulations ceased to be legal in time of peace.[3] In the case of the navy, as in the case of the army, the first code of rules, enforceable by courts martial, come from the Commonwealth period.[4] But, while the code of rules for the discipline of the army ceased to exist at the Restoration, the code of rules for discipline of the navy became the basis of the first Naval Discipline Act, which was passed in 1661.[5] This Act remained in force for more than eighty years ;[6] but, when Blackstone wrote, it had been "new modelled and altered"[7] by an Act of 1749,[8] which was the basis of the law till 1861.[9]

(ii) We have seen that in 1641 Parliament had declared that the Crown had no power to impress men for the army.[10] On the other hand, the Crown had and has power to impress men for the navy, though its power has now fallen into desuetude. In 1743, in *The Case of Alexander Broadfoot*,[11] Sir Michael Foster demonstrated that, from an early date down to modern times, the Crown had exercised this power. It was a power which was not founded on any statute, but on immemorial usage ; and its legality had been recognized by many Acts of Parliament.[12] Only mariners—"persons who have freely chosen a seafaring life, persons whose education and employment have fitted them for the service and inured them to it,"[13] could be pressed. But if the warrant which empowered the press gang to act was not properly executed—e.g. if, as in that case, the warrant directed that it should be executed by a commissioned officer and it was not so executed—all that the press gang did was illegal.[14] Similarly, if a non-seafaring man, or a man specially exempted, was impressed, he could contest the legality of the impressment by a writ of habeas corpus.[15] The power was an arbitrary power, contrary to the whole spirit of the constitution ;[16] and, as Lord

[1] Vol. i 530-531.
[2] Anson, Law of the Constitution, vol. ii Pt. ii (4th ed.) 217-218.
[3] Clode, Military and Martial Law 41, 42 n. 2.
[4] Ibid 41-42. [5] 13 Charles II c. 9.
[6] Clode, Military and Martial Law 42. [7] Comm. i 420.
[8] 22 George II c. 33. [9] Clode, Military and Martial Law 44.
[10] Above 377.
[11] Foster, Rep. 154 ; Bl. Comm. i 418-419 ; vol. iv 329.
[12] Foster, Rep. at pp. 159-174. [13] At p. 157. [14] At pp. 155-156.
[15] R. v. Tubbs (1776) Cowper 512 ; *ex parte* J. Fox (1793) 5 T.R. 276 ; *ex parte* Drydon (1793) ibid 417 ; The King v. Edwards (1798) 7 T.R. 745.
[16] This fact was brought out by Voltaire in one of his letters, cited vol. xi 404 n. 1.

Mansfield said, only to be justified by "that trite maxim of the constitutional law of England that private mischief had better be submitted to, than that public detriment and inconvenience should ensue." [1] It is perhaps the most striking illustration of the importance which the public opinion of all ages in English history has attached to the maintenance of a strong navy; and it illustrates indirectly Adam Smith's statement as to the attractions of a seafaring life—the liability to be impressed did not act as a deterrent.[2]

From this account of the Crown's prerogatives in relation to the army and the navy, it is clear that, when Blackstone wrote, they had been considerably added to, and to some extent controlled, by Parliament. In particular, Parliament had created two codes of rules for the government of soldiers and sailors, which were wholly distinct from the common law. These developments had given rise to many constitutional problems. First, what was the relation of the powers conferred upon the Crown by the Mutiny Acts to its common law or prerogative powers in times of invasion or rebellion? Secondly, could the Crown at such times govern its subjects—civilians as well as soldiers—by any form of martial law? Thirdly, what was the relation of these codes of military and naval law to the common law? Fourthly, what was the relation of persons subject to military or naval law to the common law? Blackstone does not deal with these questions. But they were beginning to be raised at or shortly after the time when he wrote. With the first two of these questions I shall deal later in this chapter.[3] With the second two I must at this point say a few words.

(i) The question of the relation of these codes of military and naval law to the common law was considered in 1792 in the case of *Grant v. Gould*.[4] It was held, in effect, that the courts martial, which administered these codes, are subject to the control of the common law by means of the prerogative writs of prohibition, certiorari, and habeas corpus; [5] but that that control can only

[1] R. v. Tubbs (1776) Cowper at p. 518; the same opinion was expressed by Sir Robert Walpole in 1741, and he admitted that the power could easily be abused, Parlt. Hist. xii 55; that it was abused can be seen from the allegations made by Mr. Temple Luttrell in 1771, Parlt. Hist. xix 81-85.

[2] "A tender mother, among the inferior ranks of people, is often afraid to send her son to school at a seaport town, lest the sight of the ships and the conversation and adventures of the sailors should entice him to go to sea," Wealth of Nations (Cannan's ed.) i 112.

[3] Below 707-713.

[4] 2 Hy. Bl. 69.

[5] "This court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the courts of Westminster Hall, must depend upon the same rules, with all other courts which are instituted, and have particular powers given them, and whose acts, therefore, may become the subject of application to the courts of Westminster Hall for a prohibition. Naval courts martial, military courts martial, courts of Admiralty, courts of Prize, are all liable

be exercised if a military or naval court martial is acting without jurisdiction. The fact that a court martial has come to a wrong decision, the fact that it has not complied with the rules of the common law as to the reception or rejection of evidence, or the fact that its procedure has not been in all respects quite regular, are no grounds for interference.[1] The case of *Grant v. Gould* was a case in which a writ of prohibition was applied for. The same principle has been applied, in nineteenth-century cases, to the writs of habeas corpus and certiorari. "Where," it has been said,[2] "the civil rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the tribunal has either acted without jurisdiction, or has exceeded its jurisdiction, this court ought to interfere to protect those civil rights." It would follow that, in such a case, the person injured, whether soldier or civilian, might, in an appropriate case, be able to bring an action in tort against the officer who had acted without jurisdiction or in excess of his jurisdiction.[3] But the court will not interfere if civil rights are not affected. If it is merely the military status of the applicant which is affected, the court has no jurisdiction, because these are matters which fall within the absolute discretion of the Crown. Thus in the case of *Barwis v. Keppel*[4] it was held that a serjeant had no cause of action against an officer, who had reduced him to the ranks.

(ii) In considering the relation of persons subject to military or naval law to the common law, we must distinguish between (*a*) the case of a person subject to military or naval law doing an illegal act to the injury of a person not so subject; and (*b*) the case of a person subject to military or naval law, who has used his authority under that law to injure another who is also subject to it.

(*a*) It is quite clear that all concerned in doing the act are liable, according to the nature of the case, to either a civil action or to a prosecution. But it is also clear that the punishment inflicted upon, or the damages given against, the guilty person, will depend upon the sort of act done, the circumstances under

to the controlling authority, which the courts of Westminster Hall have from time to time exercised, for the purpose of preventing them exceeding the jurisdiction given to them," ibid at p. 100; for the manner in which Willes C.J. asserted the dignity of his court against the pretensions of a court martial see Horace Walpole, Letters (ed. Toynbee) ii 251.

[1] 2 Hy. Bl. at p. 101; cp. R. v. Suddis (1801) 1 East at pp. 315-316 *per* Grose J.; *ex parte* Fernandez (1861) 10 C.B. N.S. at p. 37 *per* Erle C.J.; note that the judges, parties, and witnesses in a properly constituted military court have the same absolute privilege in respect of words spoken as the judges, parties and witnesses in any other court, Dawkins v. Lord Rokeby (1875) L.R. 7 H. of L. at pp. 754-755.

[2] *In re* Mansergh (1861) 1 B. and S. at p. 406, *per* Cockburn C.J.

[3] Heddon v. Evans (1919) Sullivan, Military Law 87 *per* McCardie J.

[4] (1766) 2 Wils. 314; cp. *in re* Poe (1833) 5 B. and Ad. at p. 688 *per* Denman C.J.; *in re* Mansergh (1861) 1 B. and S. at pp. 406-407 *per* Cockburn C.J.

which it was done, and the question whether the person before the court had given or had only obeyed an order. There is a clear distinction, for instance, between an order given by an officer to fire down a street when nothing unusual is occurring, and a similar order given when a riot is in progress; and, if the order is prima facie reasonable, between the case of the officer who gives the order and the soldier who obeys it. There are dicta, and a South African decision, to the effect that, if a soldier acts under orders of his officer, which are not clearly illegal, he is justified by his orders.[1] But the question whether the reasonable but illegal orders of an officer are an absolute justification to the soldier who obeys them, or whether they are only a ground for a mitigation of damages or punishment, has not yet been decided by an English court.

(*b*) Towards the end of the eighteenth century the question whether a person subject to naval or military law could sue a person who had used his authority under that law to injure him, had come before the courts. But though there was a strong dictum of the court of Exchequer Chamber that, in such a case no action lay, the question was, by the admission of the court which uttered that dictum, left undecided.

In the case of *Wall v. McNamara*[2] the direction of Lord Mansfield to the jury would seem to show that he then thought that, if damage were inflicted maliciously, an action would lie; and the case of *Swinton v. Molloy*[3] would seem to show that he was of the same opinion a few years later. But in the case of *Sutton v. Johnstone*[4] both he and Lord Loughborough, sitting in the court of Exchequer Chamber, gave it as their opinion that, even if malice were proved, an action would not lie.[5] The facts of that case were as follows: In 1781 Sutton was the captain of His Majesty's ship "Isis"; and Johnstone was the commander of the squadron. In the April of that year there was an engagement between the French and English fleets, in which the "Isis" was damaged. The French sailed away; and Johnstone ordered the English ships to slip their cables and pursue. Sutton, owing to the condition of his ship, did not obey these orders. Johnstone thereupon put Sutton under arrest for disobedience to orders, and sent him to England to be tried by a court martial. In 1783 he

[1] Keighley v. Bell (1866) 4 Fost. and Fin. 763, at p. 790 *per* Willes J.; Stephen, H.C.L. i 205-206; R. v. Smith (1900) 17 Cape Supreme Court Rep. 561, cited Keir and Lawson, Cases in Constitutional Law 348-351; cp. Forsyth, Leading Cases 215-216.

[2] (1779) cited *arg.* in Johnstone v. Sutton (1785), 1 T.R. at pp. 536-537.

[3] (1783) cited *arg.* 1 T.R. at pp. 537-538.

[4] (1785) 1 T.R. 493-510—in the court of Exchequer; (1785-1786) ibid 510-550—in the Exchequer Chamber; (1787) ibid 784, 1 Bro. P.C. 76—in the House of Lords; on the whole subject see an article by the author in L.Q.R. xix 222-229.

[5] 1 T.R. at pp. 548-550.

was tried and honourably acquitted. He then brought an action for malicious prosecution against Johnstone. The defendant pleaded the general issue. The jury found for the plaintiff. The defendant then moved in arrest of judgment, on the ground that no action for malicious prosecution would lie at suit of a subordinate officer against his superior officer. The court of Exchequer refused to arrest judgment. This decision was reversed in the Exchequer Chamber and the House of Lords, not upon the broad ground that no such action would lie, but upon the narrow ground that the action did not lie in this case, because there was reasonable and probable cause for the prosecution. But Lords Mansfield and Loughborough, in the court of Exchequer Chamber, expressed themselves very strongly in favour of the broad proposition contended for by the defendant. At the same time they were careful to add that the case was one of first impression, that it remained open for decision, and that it was "fit to be settled by the highest authority." [1] It is curious that in 1936 as in 1786 it still remains to be settled by the highest authority.

It is true that there is a decision of Willes, J., in the court of Common Pleas,[2] a decision of the court of Queen's Bench,[3] and dicta of the court of Exchequer Chamber,[4] in favour of the dicta in the case of *Sutton v. Johnstone*, that no action will lie. But from the decision of the court of Queen's Bench Cockburn, C.J., dissented; and he showed that there are many cases which, if they do not in terms decide the question in the contrary sense, assume that the law is otherwise.[5] As Lords Mansfield and Loughborough said, it is a question of mixed law and policy. The arguments based upon policy are clearly and forcibly expressed in their dicta on the one side,[6] and in the dicta of Eyre, B.,[7] and the judgment of Cockburn, C.J., on the other.[8] The paramount importance of the preservation of discipline, the necessity of freedom from the fear of vexatious actions at law, and the fact that a remedy was then provided for an aggrieved soldier or sailor by the Articles of War, as it is now provided by the Army and Navy Discipline Acts, are the great arguments in favour of

[1] "There is no authority of any kind either way; and there is no principle to be drawn from the analogy of other cases, which is applicable to trials by a sea court martial under the marine law, confirmed, directed, and authorized by statute. And therefore it must be owned that the question is doubtful: and when a judgment shall depend upon a decision of this question, it is fit to be settled by the highest authority," 1 T.R. at p. 550.

[2] Dawkins v. Lord Rokeby (no. 1) (1866) 4 Fost. and Fin. 806.

[3] Dawkins v. Lord Paulet (1869) L.R. 5 Q.B. 94.

[4] Dawkins v. Lord Rokeby (no. 2) (1873) L.R. 8 Q.B. at pp. 270-271.

[5] (1869) L.R. 5 Q.B. at pp. 100-111; cp. L.Q.R. xix 225-227.

[6] 1 T.R. at pp. 548-550.

[7] 1 T.R. at pp. 503-504.

[8] L.R. 5 Q.B. at pp. 107-111.

the dicta of Lords Mansfield and Loughborough. These arguments are admitted by those who take a contrary view; but it is contended that the common law remedy is not excluded by the remedy given by the Army and Navy Discipline Acts, and that a right of action existing only when a malicious intent can be proved, would not be detrimental to discipline, and would be in harmony with the principles of the common law. Cockburn, C.J., said: [1]

> I cannot bring myself to believe that officers in command would hesitate to give orders which a sense of duty required . . . from any idle apprehension of being harassed by vexatious actions. Men worthy of command would do their duty . . . and would trust to the firmness of judges and the honesty and good sense of juries to protect them in respect of acts, honestly, though possibly erroneously done under a sense of duty.

That this is the case can be seen from the fact that magistrates and others do not as a rule hesitate to employ force to suppress disorder, although they may be sued, not only if they act maliciously, but if they fail to hit the exact line between excess and defect.[2] At the present day the tendency to sap the supremacy of the common law, by giving even to civilian officials a jurisdiction, the exercise of which cannot be called in question by the courts, will probably turn the scale in favour of the dicta of Mansfield and Loughborough.

The powers which are incident to the King's position as head of the army and the navy are obviously the most important parts of his prerogatives in relation to national defence. But they are not the only parts. He has other powers which are incidental to and connected with this prerogative. Some of these are the result of the insular position of Great Britain; and others aim at giving to the Crown control over the movements and other activities of his subjects in time of war.

(i) The principal prerogative of the Crown which is the result of the insular position of Great Britain is its prerogative in relation to ports and havens. As Blackstone says, it is partly due to the necessities of national defence, and partly for fiscal reasons, that "the King has the prerogative of appointing *ports* and *havens*, or such places only, for persons and merchandise to pass into or out of the realm, as he in his wisdom sees proper." [3]

Hale defines a port as "an haven and something more." It is *quid aggregatum*, consisting of somewhat that is natural, viz. an access of the sea, whereby ships may conveniently come, safe situation against

[1] L.R. 5 Q.B. at p. 108; cp. the dicta of McCardie J. in Heddon v. Evans (1919), O'Sullivan, Military Law 72-88.

[2] Below 706.

[3] Comm. i 263-264; the best and most exhaustive account of this prerogative is to be found in the second part of Hale's Treatise, entitled "De Portibus Maris," which is printed in Harg. Law Tracts, pp. 45-113; for this Treatise see vol. vi 588-589.

the winds where they may safely lye, and a good shore where they may well unlade ; something that is artificial, as keys and wharfs and cranes and warehouses and houses of common receipt ; and something that is civil, viz. privileges and franchises, viz. *jus applicandi, jus mercati,* and divers other additaments given to it by civil authority.[1]

It may include " more than the bare place where ships unlade." Thus Gravesend is a member of the port of London, and Teignmouth of the port of Exeter.[2] " Every publick port is a franchise of liberty " [3]—like a market or fair ;[4] and, as such could only be created by the Crown.[5] But, like other franchises, it could be granted to a subject, or acquired by a subject by prescription.[6] The franchise was distinct from the soil over which it existed, and the ownership of the franchise and the soil might be in different hands.[7] The possession of the franchise gave the holder the right to impose certain dues upon all who used the port, whether or not he owned the soil ;[8] and a charge, e.g. for anchorage, which could not be exacted by the owner of the soil,[9] could be imposed by the owner of the franchise.[10]

Ports created by the Crown, whether in the hands of the Crown or of its grantees, were subject to rights belonging to the public, and to rights belonging to the Crown *jure prerogativae.*[11] The rights belonging to the public included free ingress and egress for subjects and aliens, the right to use the port subject only to the payment of the accustomed tolls, and the right that the port shall be kept " from impediments and nuisances " that would hinder its user.[12] The rights belonging to the King *jure prerogativae* were of much greater constitutional importance. They

[1] De Portibus 46.

[2] Ibid 46-47, 48-50 ; The Mayor of Exeter v. Warren (1844) 5 Q.B. 773, and at p. 802.

[3] De Portibus 50.

[4] But there was this difference : in the case of a market, the King could not set up a second market so close to the first, that the trade of the first was damaged ; but there was no such restriction in the case of a port ; " the reason of the difference between it and a market are evident, viz. because that a port is of concernment to the whole trade of the kingdom, and also to the defence of the kingdom, the increase of shipping and mariners, and the increase of the king's revenue, which is of a common good to the kingdom ; and therefore he may erect a concurrent port though near another, so it be not within the proper limits of the former," De Portibus 60.

[5] Ibid 53-54. [6] Ibid 55.

[7] Ibid 72-73 ; cp. Mayor of Exeter v. Warren (1844) 5 Q.B. at pp. 799-800.

[8] De Portibus 74-78.

[9] Gann v. The Free Fishers of Whitstable (1865) 11 H.L.C. 192.

[10] Foreman v. Free Fishers and Dredgers of Whitstable (1869) L.R. 4 H. of L. 266, at pp. 279-282.

[11] These are distinct, as Hale points out (De Portibus 89), from the King's rights as owner of the soil or of the franchise—" Tho' the dominion either of franchise or propriety be lodged either by prescription or charter in a subject, yet it is charged or affected with that *jus publicum* that belongs to all men ; and so it is charged or affected with that *jus regium,* or right of prerogative of the king, so far as the same is by law invested in the king."

[12] De Portibus 84 ; cp. Bolt v. Stennett (1800) 8 T.R. 606.

included general powers of control over ports "for the safety of the realm, the benefit of commerce, or the security of the customs"; [1] and, in the sixteenth and early seventeenth centuries, the Crown claimed very much larger rights which were consequential upon his claim that control over foreign affairs, and therefore control over foreign trade, was a matter which fell within the sphere of his absolute prerogative. We have seen that in *Bates's Case* [2] the judges had upheld the legality of these claims. They had laid it down that the ports were the *ostia regni* which the King, as the absolute controller of foreign trade, could open and shut at his pleasure; [3] from which they had deduced the conclusion that he could impose a condition upon opening them, which condition might be the payment of a duty.[4] It is obvious from Hale's cautious statement [5] that the law could not be thus stated in his day. The legislation of the Long Parliament had made it clear that no duties could be imposed without Parliamentary sanction.[6] Subject to the doubt which still existed when Hale wrote as to the ambit of the dispensing power,[7] it was clear that the King could not close his ports against the import or export of all goods; [8] that he could not close them against the import of particular goods; [9] and that, though the export of particular goods was sometimes forbidden, the legality of this prohibition was questionable, except possibly "in the time of hostility or public danger or common scarcity." [10] When Blackstone wrote it was clear that in time of peace all such restraints were void.[11] There was an attempt, in 1766, to prove that an embargo on ships laden with wheat was a lawful exercise of the prerogative, because in an emergency, such as a time of scarcity, the Crown had power to take what measures it

[1] De Portibus 72; in the earlier part of the seventeenth century the Crown claimed the ownership of land between high and low watermark, and consequently, that no pier or jetty could be built without royal licence, E. Hughes, Studies in Administration and Finance 42-44.

[2] (1606) 2 S.T. 371; vol. vi 44-45.

[3] "No exportation or importation can be but at the king's ports. They are the gates of the king, and he hath absolute power by them to include or exclude whom he shall please," 2 S.T. at p. 389 *per* Flemming C.B.; cp Hale, De Portibus 89, "the ports of the kingdom are the januae and ostia regni."

[4] Vol. vi 44-45. [5] De Portibus, chaps. viii and ix.

[6] Vol. vi 112.

[7] Ibid 217-225; De Portibus 93—it is noteworthy that Hale considered that the King, though he might dispense in particular cases, had no power "to grant a general dispensation."

[8] Ibid 94-95, 96. [9] Ibid 95.

[10] Ibid 96; even in this case Hale thought that the legality of a prohibition was very questionable—"we may easily guess that they were not effectual for perpetuity, nor indeed sufficient provisions *pro tempore:* for the king and his council thought not fit to rest upon such ineffectual means, but acts of parliament have successively passed for the inhibition of exportation of these very things, with penalties of forfeitures added to them."

[11] Comm. i 270-271.

saw fit for the safety of the people.[1] That attempt failed, and the ministers responsible for ordering the embargo were obliged to shelter themselves by an Act of Indemnity.[2] On the other hand, in order to facilitate the collection of the customs, the Crown was empowered by statute to "ascertain the limits of all ports, and to assign proper wharfs and quays in each port, for the exclusive landing and loading of merchandize."[3] Under modern statutes these powers, and the general power of the Crown to control ports, are vested in the Treasury, the Customs Commissioners, the Board of Trade, and the Admiralty.[4]

Another prerogative which results from the insular position of Great Britain is the prerogative of erecting "beacons lighthouses and sea-marks." The King can order them to be erected not only on his own lands, but also on the lands of a subject.[5] In 1565[6] this power was delegated to the corporation of the Trinity House, which now has general authority over lighthouses, buoys and beacons in England, Wales, and the Channel Islands.[7]

(ii) From a very early period the law has given to the Crown considerable powers of control over the movements and other activities of its subjects in time of war. These powers were not at first very clearly defined; and the powers possessed by the Crown in time of war were not clearly distinguished from the powers which it possessed in time of peace. They have become more clearly defined and distinguished, and have in some cases altered their shape, partly as the result of the ascertainment of some of the leading principles of English constitutional law and of international law, and partly as the result of decisions of the courts.

I shall consider (*a*) the powers of the Crown over the movements of its subjects; (*b*) its powers over aliens; and (*c*) its powers over other activities of its subjects.

[1] Parlt. Hist. xvi 245-250, 251-313; Lord Camden had argued that the condemnation of the dispensing power in the Bill of Rights "as assumed and exercised of late," gave the Crown power to dispense in times of emergency, ibid 263, and that the Crown at such times could suspend a statute, ibid 265-266, 281-283; as late as 1778 Camden defended his view of the law, and contended that an Act of indemnity was not necessary, Parlt. Hist. xix 1247-1248, cited above 365 n. 2.

[2] 7 George III c. 7.

[3] Bl. Comm. i 264, citing 1 Elizabeth c. 11; 13, 14 Charles II c. 11 § 14.

[4] Halsbury, Laws of England (2nd ed.) vi 547 and n. (*q*).

[5] Bl. Comm. i 265; Coke, Third Instit. 204 says, "no person can build or erect lighthouses, pharos, sea-marks or beacons without lawful warrant or authority"; and, Fourth Instit. 148-149, that at common law only the King could erect them "which was done by the king's commission under the great seal . . . but of latter times by the letters patents granted to the lord admirall he hath power to erect beacons, sea-marks, and signs for the sea."

[6] 8 Elizabeth c. 13.

[7] Halsbury, Laws of England xxvi 627.

(a) The Crown's powers over the movements of its subjects.

At common law the King had certain powers to control the movements of his subjects. These powers enabled him either to prevent his subjects from leaving the realm, or to command them to return to the realm. The history of the law as to the conditions under which the King could exercise these powers was summed up by Hale [1] and Blackstone [2] as follows:

Any man might pass the seas without licence unless he was prohibited. But "because that every man ought of right to defend the King and his realms, therefore the King at his pleasure may command him by his writ that he go not beyond the seas, or out of the realm, without licence"; [3] and it would seem that, in the thirteenth and fourteenth centuries, certain persons, such as peers, knights, ecclesiastics, archers, and artificers, were for different reasons prohibited from going beyond the seas without licence.[4] At a time of public danger the King might prohibit all his subjects from going beyond the seas without licence, provided that the prohibition was temporary, that it was not imposed merely to extort money, and that it did not restrain trade.[5] That it must not restrain trade is shown by the clause of Magna Carta, which allowed merchants, native and foreign, free ingress into and egress from the realm,[6] "nisi publice antea prohibiti fuerint." [7] Conversely, with respect to the King's power to command his subjects to return to the kingdom, Blackstone, following Coke,[8] tells us that, "if the King send a writ to any man when abroad, commanding his return, and the

[1] De Portibus, chap. viii.

[2] Comm. i 265-266; for a good modern summary see McKechnie, Magna Carta (2nd ed.) 408-410.

[3] Bl. Comm. i 265; Wynne, Eunomus iii 314-316, states the law in the same way.

[4] Bl. Comm. i 265-266.

[5] "At common law in time of public danger, and *pro hac vice*, there might be a general inhibition by proclamation, restraining any person from going beyond sea without licence. But that was not to be made an engine to gain money, or restrain trade. . . . And by the opinion of Fitzherbert, N.B. 85, this power still remains, viz. in case of public danger, and *pro hac vice*," Hale, De Portibus 91-92; see vol. i 230 n. 7 for Fitzherbert's opinion.

[6] § 41 (1215), § 30 (1225); the clause is cited, vol. ix 94 n. 2; above 375.

[7] This qualification was inserted in 1225; Coke, Second Instit. 57, in his unhistorical way, says, "the prohibition intended by this act, must be by the common or publique councell of the realme, that is by act of parliament, for that it concerneth the whole realme, and is implyed by this word *publice*"; though this came to be the law it is an historically impossible construction to put upon a document which comes from 1225; this fact was recognized by Hale, who thought that the public prohibition might be by proclamation, see Forsyth, Cases and Opinions on Constitutional Law, 165; above n. 5; on this view of the law Charles I's proclamation against taking passages to America, because amongst them were "idle and refractory persons" who wished to live out of reach of authority (Tudor and Stuart Proclamations i no. 1773) was a lawful exercise of the prerogative.

[8] Third Instit. 179; Hawkins, P.C. Bk. I c. 22; Leoline Jenkins thought that the court of the Constable and Marshal had jurisdiction in such a case, Wynne, Life of Jenkins ii 712.

subject disobeys, it is a high contempt of the King's prerogative, for which the offender's lands shall be seized till his return, and then he is liable to fine and imprisonment." [1]

The law as to liberty to leave the realm was changed by a statute of 1381,[2] which forbade all subjects to cross the sea without licence, except, "the lords and other great men of the realm, and true and notable merchants, and the King's soldiers." In 1603 an Act directed against Jesuits and seminary priests, forbade women and children under age to cross the seas without the licence of the King or of six or more of his Council.[3] The statute of 1381 seems to have become a dead letter in the sixteenth century.[4] It was repealed in 1607,[5] so that the common law, as modified by the Act of 1603 was restored. But, in spite of this repeal, the King assumed a larger power to prevent his subjects from leaving the realm than was warranted by the common law. In 1630 noblemen wishing to travel abroad were required to have passports, and commoners were required to have licences signed by the secretary of state.[6] These regulations were repeated in 1660; [7] and in 1679 it was said that "our Lawes restrain most sorte of persons even from passing beyond Sea without lieve askt and had from his Ma^tie or his Councill." [8] In 1675 the prerogative to recall subjects was exercised by a proclamation, which ordered the immediate return of those subjects who had entered the service of the French King since the treaty with the United Provinces.[9]

After the Revolution these extended prerogative powers ceased to be exercised; [10] and even the Crown's common law

[1] Comm. i 266; this prerogative was asserted to be an existing prerogative by Northey, the attorney-general, in 1703-1704, Chalmers, Opinions of Eminent Lawyers ii 364, by West the counsel to the Board of Trade in 1718, ibid ii 251, 253, and by Philip Yorke in 1730, ibid ii 261; Parlt. Hist. viii 787; but it was pointed out by the solicitor-general in 1718 that there was "no method of getting at them by any process abroad," and that compulsion could only be applied by means of diplomatic methods, Forsyth, op. cit. 164; it is said that the last instance of the exercise of this prerogative was the case of Lord Wharton who had seceded to the court of St. Germains, Ed. Rev. xlii 113; but the power to recall seamen was recognized in 1730, Chalmers, op. cit. ii 261-262; seamen, however, were in a peculiar position both in respect to this prerogative, and in respect to the prerogative to prevent subjects from leaving the realm, below 392.

[2] 5 Richard II St. 1 c. 2 § 2. [3] 1 James I c. 4 § 8.

[4] In a case argued in 1558, Dyer at f. 165*b*, there seems to have been considerable doubt as to the common law, as to the effect of this statute, and as to the effect of a general or a special prohibition imposed by the King, see Hale, De Portibus 92; McKechnie, Magna Carta (2nd ed.) 409.

[5] 4 James I c. 1 § 4; cp. Coke, Third Instit. c. lxxxiv pp. 178-180.

[6] E. R. Turner, The Privy Council of England i 151.

[7] Ibid i 395. [8] Cited ibid ii 157.

[9] Ibid 168; Leoline Jenkins considered that the Crown had an extensive prerogative to prevent his subjects from leaving the kingdom and to recall them, Wynne, Life of Jenkins ii 712; vol. xii 651.

[10] Thus in 1703 Northey, the attorney-general, wrote to Nottingham that, though going to an enemy's country without licence was an offence, "as the law

powers, as stated by Hale and Blackstone,[1] fell into disuse. "At present," says Blackstone,[2] "everybody has, or at least assumes, the liberty of going abroad when he pleases"; and the practice of issuing writs to command a subject to return had long been disused.[3] The best proof of the disuse of these prerogative powers is the fact that, if it was wished to restrain a subject from going abroad, or to recall him from abroad, recourse was had to an Act of Parliament.[4] But these powers had never been abolished. In 1788 Sir Archibald Macdonald, the attorney-general, was of opinion that they still existed. He thought that in time of national danger the Crown could still prohibit all his subjects from going abroad; and he pointed out that it was the constant practice to prohibit "marines" from going abroad "for the purpose of entering foreign service, at times when the state of Europe would render it dangerous to weaken the strength of the nation."[5] But, though possibly the prerogative might still be used in a national emergency, it is probably true to say that, with the exception of the particular case of marines, it had, when Blackstone wrote, ceased to be used to prevent subjects from going abroad. In practice the writ *ne exeat regno* was only used, as a part of the process of the court of Chancery, to prevent a defendant from withdrawing his person and property from the jurisdiction of the court.[6]

These developments were due to two causes. In the first place, public opinion was hostile to these ancient restrictions on personal liberty. In the second place, since the law merchant was part of the ordinary law,[7] and since, therefore, no distinction was now drawn between mercantile and other transactions,[8] it was only natural that the greater freedom of ingress into and egress from the kingdom, which Magna Carta had guaranteed

stands any subject may go abroad to any country at peace with her Majesty without any special licence, unless prohibited by writ or proclamation, except women and children under the age of one and twenty, who by the Statute of 1 James I cap 4 are forbidden to do so without licence from the Queen and Privy Council," S.P. Dom. 1703-1704, 172.

[1] Above 390.

[2] Comm. i 266; but Wynne, Eunomus iii 314, points out that "it would be bad politics as well as bad logic, to argue from the want of exercise, to the want of existence of such a power."

[3] Christian's note to Comm. i 266.

[4] See 22 George III c. 54—an Act to restrain Sir Thomas Rumbold and Peter Perring from going out of the kingdom for a limited time; 22 George III c. 69—an Act for compelling John Whitehill to return to this kingdom, and for restraining him, in case of his return, from going out of the kingdom for a limited time.

[5] Forsyth, op. cit. 164-166; cp. McKechnie, Magna Carta (2nd ed.) 410.

[6] Vol. i 230; Bl. Comm. i 265, and Christian's note.

[7] Vol. i 570-573; vol. v 144-147.

[8] This development is illustrated by the fact that the use of bills of exchange had, by the end of the seventeenth century, been extended to all persons, whether merchants or not, see vol. viii 169, and Bromwich v. Lloyd (1697) 2 Lut. 1585 there cited.

to the merchants,[1] should be extended to all subjects. "The statute," says Hale, speaking of § 30 of the Charter,[2] "speaks of *mercatores* but under that name all foreigners living and trading here are comprised."

The Crown has never had a prerogative power to prevent its subjects from entering the kingdom,[3] or to expel them from it.[4] It is only with respect to aliens that these powers need be considered. To this question of the Crown's powers over the movements of aliens we must now turn.

(b) The Crown's powers over the movements of aliens.

In the case of aliens we must begin by distinguishing between alien enemies and alien friends. Of alien enemies not much need be said. An alien enemy can be arrested and imprisoned,[5] and cannot obtain his release by a writ of habeas corpus.[6] He can be sued;[7] but, unless he has a licence from the Crown to remain in England, he cannot sue.[8] On the other hand, the law as to the position of alien friends has had a long and somewhat complex history—complex because its evolution has depended less on the logical application of legal principles than on the political and economic ideas and necessities of many different ages in English history.[9]

At the present day both statutes, and the development of legal doctrine, have drawn distinctions between various powers of the Crown in relation to the movements of aliens. We can distinguish between a power to prevent an alien from entering the realm, a power to expel aliens already within the realm, and

[1] Above 390 n. 6. [2] P.C. i 93.

[3] This conclusion followed from the rule laid down in Calvin's Case (1607) 7 Co. Rep. at f. 5*a*, that the duties of allegiance and protection were reciprocal and indissoluble; and from the rule laid down in 1454 that the King could not by his prerogative deprive his subjects of the benefit of the common law, vol. ix 78 and n. 4; the existence of this rule was assumed in Musgrove v. Chun Teong Toy [1891] A.C. 272; an attempt was made in 1793 to justify a proclamation forbidding subjects to return, on the ground that the King could regulate the general policy of the country, and could make entry into the country conditional in time of war, Parlt Hist. xxx 626, 931; but it is clear that there is no authority for any such proposition, see ibid 929-930, 933-935.

[4] Bl. Comm. i 137-138; Chalmers, Opinions of Eminent Lawyers i 4; Forsyth Cases on Constitutional Law 36; on the whole subject, and on the question of the effect of legislation on the Crown's powers, see an article by W. F. Craies, L.Q.R. vi 388; vol. xi 569.

[5] Sylvester's Case (1702) 7 Mod. 150.

[6] R. v. Schiever (1759) 2 Burr. 765.

[7] Porter v. Freudenberg (1915) 1 K.B. at pp. 880-883.

[8] "He is an enemy of our lord the king, in which case he shall have no benefit from his laws," Anon. (1513) Dyer at f. 2*b*; Porter v. Freudenberg [1915] 1 K.B. at pp. 870-874; Rodriguez v. Speyer Bros. [1919] A.C. 59; vol. ix 98.

[9] On this subject see The Alien Law of England, Ed. Rev. xlii 99-174; W. F. Craies, The Right of Aliens to Enter British Territory, L.Q.R. vi 27-41; T. W. Haycraft, Alien Legislation and the Prerogative of the Crown, L.Q.R. xiii 165-186.

a power to extradite alien criminals who have taken refuge in the realm. But it was long before these distinctions emerged. Both those who asserted and those who denied the existence of large prerogatives over the movements of aliens, did not stop to distinguish between these powers, and asserted or denied that the Crown possessed all of them. It is only in the latter part of the nineteenth century, and mainly as the result of legislation, that these distinctions have emerged, and have gone far to settle a branch of constitutional law which has given rise to many controversies. In relating its history I shall deal, in the first place, with the evolution of the law before these distinctions had emerged, and, in the second place, with the emergence of these distinctions.

(i) In spite of the clause of Magna Carta which gave English and foreign merchants free ingress into and egress from the realm,[1] the Crown, during the Middle Ages, exercised wide powers over the movements of aliens. That it was able to exercise these powers was due to two causes :

In the first place, though Magna Carta might give alien merchants the right of ingress into or egress from the kingdom, it was difficult for them to assert that right at a time when access to the common law courts was denied to them.[2] "All along," says Maitland,[3] "it is as men privileged by the King rather than as men subject to ordinary law that the foreign merchants get a hearing. . . . There is little common law for these people." Though, as we have seen, this attitude of the common law courts was beginning to be modified at the end of the mediæval period, and though it was changed in the sixteenth century and later,[4] that change only affected those aliens who were actually living in the kingdom. It did not affect aliens who had not yet effected an entry into the kingdom.[5] We shall see that this difference in the legal position of these two classes of aliens has helped to establish the modern distinction between the Crown's power to exclude, and its power to expel, aliens.[6] In the second place, the jealousy of the native merchants made for the maintenance of large powers in the Crown. The Charter, which gave the foreign merchants free ingress into or egress from the kingdom, also guaranteed the liberties and customs of London and the other boroughs ; and

the burghers have a very strong opinion that their liberties and customs are infringed if a foreign merchant dwells within their walls for more than forty days, if he hires a house, if he fails to take up his abode with some

[1] Above 390 n. 6.

[2] Vol. ix 93-94 ; for cases from Henry III's reign in which the Crown restrained aliens from entering the kingdom see Hale, De Portibus 90.

[3] P. and M. (1st ed.) i 449 ; cp. vol. ix 94-95.

[4] Ibid 96-97. [5] Ibid 98 ; below 396. [6] Below 397-398.

responsible burgher, if he sells in secret, if he sells to foreigners, if he sells in detail.[1]

The result was that, on the one hand, the foreigner was obliged to look to the Crown for protection, and that, on the other, the English merchant appealed to the Crown to banish, or otherwise fetter, his activities. Moreover, in the fourteenth and fifteenth centuries, the English merchant had an important advantage over the alien—he could make his voice heard in Parliament. Sometimes the petitions against aliens were shelved;[2] sometimes edicts of expulsion were issued against particular classes of aliens;[3] and occasionally a statute ordered the expulsion of, or otherwise regulated, the classes of aliens therein named.[4] But I think that the proper inference from these petitions and statutes is not, as some have maintained,[5] that the King did not possess a wide prerogative to control aliens, but rather that they recognize and consolidate that prerogative.[6] The correctness of this inference is shown by the fact that the King sometimes entered into treaties to expel fugitive criminals;[7] and nowhere is it suggested that such treaties needed Parliamentary sanction to make them effective.

As we might expect, this wide prerogative of controlling the movements of aliens was exercised in the sixteenth century.[8] Its existence was not questioned either then, or in the course of the constitutional controversies of the first half of the seventeenth century.[9] In these circumstances there can be no doubt

[1] P. and M. i 447-448. [2] L.Q.R. xiii 177. [3] Ibid 176, 177-178.

[4] 1 Richard III c. 9 (alien artificers); 14, 15 Henry VIII c. 2, 21 Henry VIII c. 16, and 32 Henry VIII c. 16, made further regulations as to these aliens.

[5] This argument is used by the writer of the article in the Ed. Rev. xlii at p. 164, and by Mr. Craies, L.Q.R. vi, 32.

[6] I think Mr. Haycraft is right when he says, L.Q.R. xiii 178-180, "Those transactions which affect aliens generally are invariably ordinances or statutes made at the desire of the Commons and generally at the request of parties with particular interests to serve. . . . It cannot be seriously argued that Edward III or Henry IV ought to have refused the petitions of the Commons if they were to reserve their own rights. To the later statutes affecting artificers the same argument applies. They were an engagement unwillingly made by the Crown to exercise powers in a certain direction, not a concession that such powers could only be exercised by statute."

[7] In 1174 Henry II and William of Scotland agreed to deliver up fugitive felons; in 1303 Edward I and Philip of France each agreed to expel from his realm the enemies of the other; in 1496 Henry VII and the Duke of Burgundy each agreed to order the rebels and fugitives from the dominions of the other to leave the realm, L.Q.R. xiii 180.

[8] Ibid 178-179.

[9] There is a tale, related Ed. Rev. xlii 159, that a Frenchman in Charles II's reign appeared at the theatre with the King's mistress, and that Charles II was obliged to write to Louis XIV to recall him, as he had no power to expel him—but it cannot be seriously contended that such tales prove much as to the law; in 1636 the Council resolved to exclude aliens, and to expel all aliens who were not thought fit to stay in England, E. R. Turner, The Privy Council ii 372; it is not likely that Charles II would have abandoned a prerogative which was not questioned in his father's reign.

that Jeffreys, C.J., was warranted in saying in 1684, "I conceive the King had an absolute power to forbid foreigners whether merchants or others, from coming within his dominions, both in times of war and in times of peace, according to his royal will and pleasure; and therefore gave safe-conducts to merchants, strangers, to come in, at all ages, and at his pleasure commanded them out again." [1] In 1705 Northey, the attorney-general, said that the Crown had power to exclude aliens; [2] in 1771 the secretary of state directed that no Jews should be allowed to enter England except under certain conditions.[3] Blackstone said that aliens "were liable to be sent home whenever the King sees occasion"; [4] and, a fortiori, he would have maintained the power of the Crown to prevent them from landing. Loughborough in 1792,[5] and Eldon and Ellenborough in 1816, expressed the same opinion in a debate in the House of Lords; [6] that opinion was supported by Chitty in 1820,[7] and by Mr. Haycraft in 1897; [8] and, in this century, Lord Atkinson said that "aliens whether friendly or enemy can be lawfully prevented from entering this country and can be expelled from it." [9]

Nevertheless the influences which were making for a denial of this prerogative were beginning to be felt in the sixteenth century; and they gathered strength in the seventeenth, eighteenth, and early nineteenth centuries. These influences can be grouped under three heads. In the first place, we have seen that, in the sixteenth century, it was recognized that alien friends could bring personal actions in the common law courts, and that they owed a temporary allegiance.[10] We have seen also that it was recognized that even alien enemies, if they were resident in this country with the express or even with the tacit permission of the Crown, must be treated as alien friends.[11] This led to the idea that aliens resident in this country, and owing a local allegiance, possessed many of the rights of subjects—a conclusion to which, as we have seen, the House of Lords gave its sanction in the case of *Johnstone v. Pedlar* in 1921.[12] It was therefore not difficult to conclude that the Crown's powers over these resident aliens were no greater than its powers over its own subjects; and, in particular, that it had no power to exclude or expel them whenever it saw fit. In the second

[1] The East India Co. v. Sandys (1684) 10 S.T. at pp. 530-531.
[2] Forsyth, Cases on Constitutional Law 35-36.
[3] Calendar of Home Office Papers 1770-1772, 343.
[4] Comm. i 259.
[5] Parlt. Hist. xxx 167.
[6] Parlt. Debates xxxiv 1065, 1069.
[7] Prerogatives of the Crown 49.
[8] L.Q.R. xiii 174 seqq.
[9] Johnstone v. Pedlar [1921] 2 A.C. at p. 283, following his earlier statement of the law in Attorney-General for Canada v. Cain [1906] A.C. 542.
[10] Vol. ix 96-97.
[11] Ibid 100-101.
[12] [1921] 2 A.C. 262; vol. ix 98; below 398.

place, during the greater part of the eighteenth century, there appear to be very few instances in which the Crown used its prerogative either to exclude or to expel aliens ; [1] and, when, at the end of the century, it was thought desirable to exclude aliens, statutory powers were got.[2] In the third place, these statutes were passed to exclude aliens who, it was thought, might spread in England the ideas of the French Revolution. They were therefore opposed by the new Whigs who sympathized with these ideas. In 1816 Romilly, Mackintosh, and Denman denied that the Crown had the wide prerogative attributed to it by Eldon and Ellenborough ; [3] the same thesis was maintained in 1825 in a learned article in the *Edinburgh Review ;* [4] and in 1890 it was supported by Mr. Craies.[5]

(ii) But though the Crown's prerogative over aliens was defended or attacked right down to our own day, without distinguishing between the power to exclude aliens from the realm, to expel aliens already within the realm, or to extradite alien criminals ; in fact these distinctions had begun to emerge at the end of the eighteenth century. In 1792 Serjeant Hill advised the government that the Crown had no general power to exclude or to expel aliens ; but that it had the power to surrender criminals—this power being " warranted by the practice of nations," belonging to it as part of its wide powers in relation to foreign affairs, and in no way interfered with by the Habeas Corpus Act, which confines the prohibition against sending prisoners abroad to subjects.[6] Since 1792 the action of the Legislature and the course of legal decision has tended to emphasize the distinction between these separate powers, and to put the law on a more certain basis.

The power to exclude aliens.—In the first place, since 1793, if the government wished to exclude aliens, it has had recourse to the Legislature.[7] It is clear that, whether or not the Crown had power to exclude, this power is in effect superseded by the statutes which now regulate that power.[8] In the second place, whether or not the King has power to exclude, the alien excluded

[1] In 1771 there was a direction that Jews unable to pay the usual freight, should, unless they had a passport from an ambassador, be excluded, Calendar of Home Office Papers 1770-1772 343.

[2] Below n. 7.

[3] Parlt. Debates xxxiv 445, 467-470 ; Hansard (N.S.) vii 172-174.

[4] Ed. Rev. xlii 99-174. [5] L.Q.R. vi 28-41.

[6] This opinion is cited *in extenso* in Ed. Rev. xlii 140-141.

[7] 33 George III c. 4 ; 56 George III c. 86 ; 11, 12 Victoria c. 20—all temporary Acts ; the Aliens Act 1905 (5 Edward VII c. 13) dealing with pauper immigrants, and the Aliens Restriction Act 1914 (4, 5 George V c. 12) are permanent Acts.

[8] " After the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions, and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been," Attorney-General v. De Keyser's Royal Hotel [1920] A.C. at p. 540 *per* Lord Atkinson.

cannot, by taking legal proceedings, assert a right to enter the country.[1] He is not a British subject, and he is not an alien resident in this country. Therefore any measures taken by the Crown to exclude him cannot give rise to any proceedings in an English court because they are acts of state.[2]

The power to expel aliens.—We have seen that in 1792 Serjeant Hill denied that the Crown had this power;[3] and we shall see that, in the second quarter of the nineteenth century, the best legal opinion of the day denied that the Crown had the power to extradite an alien criminal.[4] A fortiori it had no general power to expel aliens. This was the conclusion at which Forsyth arrived in 1869.[5] On the other hand we have seen that Lord Atkinson in 1906 and in 1921 asserted that the Crown had this power.[6] But in both these cases the assertion was merely a dictum. In the first case there was a statutory power to expel;[7] and in the second case the power to expel was not the point at issue.[8] In the first case Lord Atkinson relied on the case of *Re Adam*,[9] which, as Lord Brougham pointed out, turned entirely on the provisions of French law.[10] It is clear that Lord Brougham would have come to the opposite conclusion if the case had fallen to be decided according to the rules of English law.[11] The better opinion would seem to be that the Crown has no general power to expel an alien; but that it may have a power to expel if an alien enters the country in contravention of a statute,[12] or perhaps of a royal prohibition to enter,[13] or if the Crown has this power by the law of a particular colony.[14]

The power to extradite alien criminals.—We have seen that as early as the fifteenth century treaties providing for extradition were entered into; and that it never occurred to anyone to suggest that the Crown had gone beyond its powers in making these treaties.[15] We have seen that, in the sixteenth and early seventeenth centuries, there are cases in which applications for

[1] Musgrove v. Chun Teong Toy [1891] A.C. 272, at pp. 282-283.
[2] Vol. ix 97-98. [3] Above 397. [4] Below 399.
[5] Cases on Constitutional Law 181. [6] Above 396.
[7] Attorney-General for Canada v. Cain [1906] A.C. 542; see Johnstone v. Pedlar [1921] 2 A.C. at p. 276 *per* Lord Cave.
[8] Ibid 262. [9] (1837) 1 Moo. P.C. 460.
[10] "It is the opinion of all their Lordships that the case is one of great hardship, and that they are only compelled, and with much reluctance and regret, to give the judgment now pronounced, on the ground of the peculiar provisions of the French law," ibid at p. 477; the case came from Mauritius.
[11] He denied that the Crown had this power even in the case of a fugitive criminal, below 399 n. 5.
[12] Attorney-General for Canada v. Cain [1906] A.C. 542; Johnstone v. Pedlar [1921] 2 A.C. at p. 276.
[13] Musgrove v. Chun Teong Toy [1891] A.C. 272; Attorney-General for Canada v. Cain [1906] A.C. at p. 547; Johnstone v. Pedlar [1921] 2 A.C. at p. 289 *per* Lord Sumner.
[14] *Re* Adam (1837), 1 Moo. P.C. 460. [15] Above 395.

extradition were acceded to, and that an opinion in favour of extradition was growing up amongst international lawyers.[1] In the course of the eighteenth century, legal opinion favoured the view that the rules of international law should be regarded and enforced as part of the law of England.[2] Serjeant Hill's opinion in 1792 in favour of extradition is influenced by this consideration.[3] It is not therefore surprising to find that, in the eighteenth and early nineteenth centuries, there is authority for the view that the Crown has the power to extradite alien criminals, and that, on the ground of comity, it should exercise that power.[4] But the existence of this power was denied in the second quarter of the nineteenth century;[5] and there was authority for this view in some of the opinions given by the law officers in the latter part of the eighteenth century.[6] Probably their view was based on the principle that the Crown had no power to arrest a person who had committed no offence against the law of England. This was a sound legal reason; but its acceptance in the second quarter of the nineteenth century was probably influenced by a change in public opinion. This change was brought about as the result of the influence of that sentimental vein in the political thought, and more especially in the Whig political thought,[7] of that period, which led many to object to a prerogative power which might be used to hand back escaped slaves to their owners,[8] or revolutionaries to their despotic

[1] Vol. v 50. [2] Above 372-373.

[3] "This is warranted by the practice of nations, and is therefore not part of the legislative, but of the executive power, which is vested solely in the King, who, as observed by a late learned judge (1 Bl. Comm. 253), with regard to foreign concerns, is the representative of his people," Ed. Rev. xlii 141.

[4] "The government may send persons to answer for a crime wherever committed, that he may not involve his country; and to prevent reprisals," East India Co. v. Campbell (1749) 1 Ves. Sen. at p. 247; "by the comity of nations the country in which the criminal has been found, has aided the police of the country against which the crime was committed in bringing the criminal to punishment. In Lord Loughborough's time the crew of a Dutch ship mastered the vessel, and ran away with her, and brought her into Deal, and it was a question whether we could seize them and send them to Holland; and it was held we might. And the same has always been the law of all civilized countries," Mure v. Kaye (1811) 4 Taunt. at p. 434 *per* Heath J.

[5] Opinion of Sir John Campbell and Sir R. M. Rolfe given in 1836, Forsyth, Cases on Constitutional Law, 341-342; and see ibid 369-370; in 1842 Brougham, Denman, Campbell, Cottenham, and Lyndhurst all took this view, Hansard, Parlt. Debates lx 317-327; Brougham said, at p. 318, that "whatever right one nation had against another nation—even by treaty, which would give the strongest right—there was, by the municipal law of the nation, no power to execute the obligation of the treaty."

[6] See Calendar of Home Office Papers 1760-1765, 67, 264, 395, 396; ibid 1766-1769, 466.

[7] Lyndhurst agreed with Brougham and the others in 1842, see note 5; but in 1816 Eldon and Ellenborough argued in favour of the Crown's prerogative as against Romilly, Mackintosh, and Denman, above 396.

[8] See Denman's speech, Hansard lx 321, citing a speech of Sir C. Wetherall from Hansard (N.S.) vii 1722; Clarke, Extradition (3rd ed.) 125, says that some

rulers.[1] Whether or not the Crown had this power to extradite criminal aliens is now a matter of merely academic interest, because it has been put upon a statutory basis by the Extradition Acts.[2]

(c) The Crown's powers over the other activities of its subjects.

The Crown's powers over the other activities of its subjects are naturally greater at a time of war, rebellion, or invasion than they are in time of peace. The Crown had and still has a common law power to compel its subjects to give their services to ward off danger to the state ;[3] and it has power to enter their land and to dig trenches or erect fortifications thereon.[4] In time of war it can lay embargoes upon shipping,[5] and it can probably requisition the ships of its subjects.[6] To adhere to the King's enemies is treason,[7] and it is a criminal offence to trade with the enemy.[8] Moreover additional statutory powers, operative both in time of war and peace, have, from time to time, been given to the Crown to stop acts which might be prejudicial to the state. Statutes of Charles II's [9] and George II's [10] reigns gave the Crown power to prohibit the export of arms and ammunition ; and statutes of George II's reign gave it power to prevent its subjects from enlisting as soldiers in the service of any foreign prince or state.[11] The growth of that department of international law, which prescribes the duties owed by a neutral state to belligerents, has caused great developments in this branch of the law. Other statutes operative both in time of war and peace, have given the Crown power to acquire land for

objection was made in the House of Commons to the Act of 1843, which authorized an extradition treaty with the United States on the ground that " advantage might be taken of the treaty to get back fugitive slaves on pretended charges of robbery " ; see also Forsyth, op. cit. 370-371.

[1] Ibid 371 ; as Mr. Haycraft, writing in 1897, has said, L.Q.R. xiii 184, " in the earlier part of this century the refugee was generally an interesting person enjoying the sympathy of some portion of respectable society, and not in any way akin to the indiscriminate political assassins with whom governments are at war in these days."

[2] The earliest Acts were passed in 1843, 6, 7 Victoria cc. 75 and 76 ; the first general Act was passed in 1870, 33, 34 Victoria c. 52.

[3] Above 377 ; below 707.

[4] Vol. iii 377 ; The King's Prerogative in Saltpetre (1607) 12 Co. Rep. 12 ; *in re* a Petition of Right (the Shoreham Aerodrome Case) [1915] 3 K.B. 649 ; below 708.

[5] Bl. Comm. i 270 ; Sands v. Child (1693) 4 Mod. at pp. 177, 179.

[6] L.Q.R. xxxv 12.

[7] 25 Edward III St. 5 c. 2 ; vol. viii 307-308.

[8] Hawkins, P.C. Bk. I c. 22 ; Gist v. Mason (1786) 1 T.R. at p. 89 ; Esposito v. Bowden (1857) 7 El. and Bl. at pp. 779, 781-782 ; and therefore any contracts so made are void for illegality, The Hoop (1799) 1 C. Rob. at pp. 200-201 ; Potts v. Bell (1800) 8 T.R. 548.

[9] 12 Charles II c. 4 § 12. [10] 29 George II c. 16.

[11] 9 George II c. 20 ; 29 George II c. 17.

purposes of defence. Of the extent of some of these prerogatives, statutory or otherwise, and of the conditions under which they can be exercised, I shall speak in a later chapter.

(2) Some of these powers of the Crown in relation to national defence are closely connected with its powers in relation to commerce. We have seen that, all through English legal history, the enacted law testifies to the close connection between these two topics.[1] If the dicta in *Bates's Case*[2] had been accepted as good law, the King would have had the same absolute powers over foreign trade as he had and still has over foreign affairs;[3] and if the decision in *The Case of Ship Money*[4] had stood, the King's prerogatives in relation to national defence could have been used to give him an extra-Parliamentary revenue. The Crown had tried to make itself the sovereign power in the state by means of its absolute or almost absolute powers in relation to foreign affairs, foreign trade, and national defence.[5] This attempt failed. It was settled that all exercises of the prerogative which involved taxation direct or indirect required the consent of Parliament.[6] The Crown, therefore, lost the power to control foreign trade by means of a tariff. The result was that this, the principal means of controlling foreign trade, passed to Parliament. Though the powers of the Crown to control foreign trade were asserted in wide terms by Jeffreys, C.J., in the *East India Co. v. Sandys* in 1684,[7] and by Mr. West, the counsel of the Board of Trade, in 1718,[8] the greater economic freedom, which resulted from the fact that the Revolution had weakened the executive power of the prerogative, made for the disuse of the Crown's prerogatives to control foreign trade.[9] The Crown could incorporate companies and give them privileges to trade abroad; but, if it was wished to give them exclusive rights to trade, or jurisdictional rights, Parliamentary sanction was always got;[10] and Parliamentary control tended to become more constant.[11] In effect all that was left of these prerogatives were those which were more immediately related to the prerogatives connected with national defence.[12]

The same causes were operating even more strongly to lessen the Crown's prerogative powers in relation to internal trade.[13] But, when Blackstone wrote, the King had certain defined prerogatives in relation to it, some of which were showing signs

[1] Vol. iv 327-331; vol. vi 314-319.
[2] (1606) 2 S.T. 371.
[3] Above 369; vol. vi 44-45.
[4] (1637) 3 S.T. 825.
[5] Vol. vi 53-54.
[6] Ibid 112.
[7] 10 S.T. 371; vol. vi 326-327.
[8] Forsyth, Cases on Constitutional Law 423-427; vol. vi 335-336.
[9] Ibid 334, 336; vol. i 572.
[10] Vol. vi 334-335.
[11] Vol. viii 209-211; vol. xi, 64, 144, 148, 150.
[12] Above 374-376.
[13] Vol. vi 336-337.

of decadence, while others had long been, and continued to be, in course of transformation as the result of the action of the Legislature.

Blackstone groups these prerogatives under three heads: (i) the establishment of markets and fairs, (ii) the regulation of weights and measures, and (iii) the regulation of the coinage.[1]

(i) We have seen that, in the Middle Ages, the Crown granted to corporations and persons all sorts of rights and powers in relation to trade. Thus it granted to cities and boroughs large rights to regulate trade in the interest of their citizens, and the jurisdictional and commercial rights involved in the right to hold a fair or market.[2] It granted to individuals or to corporations exclusive rights to carry on a new trade or to manufacture a newly discovered process.[3] But, in consequence of the agitation over monopolies at the end of the sixteenth century,[4] and the statute of 1624,[5] the Crown's powers to grant exclusive rights of trade or manufacture to individuals had been limited to the right to grant patents to the first inventors of new manufactures for a term of years—and so the foundation of the modern law as to patents was laid.[6] The clauses in old charters, which gave exclusive rights to certain classes of citizens, remained till they were swept away in 1835;[7] but their legality was now said to rest upon custom; and it was admitted that they would not be good if, without Parliamentary sanction, they were inserted in a modern charter.[8] Similarly the old franchise fairs remained; and the privileges of those entitled to the franchise have been recognized in quite modern cases.[9] But the fair courts of piepowder had begun to decay at the end of the fifteenth century;[10] and changes in the economic structure of society were fast diminishing the importance of these fairs and markets, and making them, for the most part, but survivals from an older social and economic order.[11] The result was that the Crown's once extensive prerogative to control, or to give to persons or corporations power to control, internal trade were decadent when Blackstone wrote.[12] Such control as existed depended upon statutes, and statutory powers given either to the Crown, or to gilds or companies, or to justices of the peace.[13] Since the statutory restrictions thus imposed by the Legislature

[1] Comm. i 274-279. [2] Vol. i 138-139, 535-538, 540-541; vol. iv 321-322.
[3] Ibid 343-346. [4] Ibid 347-353.
[5] 21 James I c. 3; vol. iv 353; vol. vi 330-331. [6] Vol. xi 424-432.
[7] 5, 6 William IV c. 76 § 14 (The Municipal Corporations Act); vol. vi 337.
[8] City of London's Case (1610) 8 Co. Rep. at f. 125*a*, cited vol. iv 346 n. 3.
[9] Great Eastern Railway Co. v. Goldsmid (1884) 9 A.C. 927; Morpeth Corporation v. Northumberland Farmers' Auction Mart Co. [1921] 2 Ch. 154; Corporation of London v. Lyons Son & Co. [1936] 1 Ch. 78.
[10] Vol. i 539, 540. [11] Ibid 569.
[12] Vol. vi 333, 336-337. [13] Vol. xi 418-424, 469-475.

in the eighteenth century covered no great amount of ground, traders, except in so far as they were controlled by regulations made in the fiscal interests of the state, enjoyed a large amount of commercial freedom.[1] The way was thus prepared for the acceptance of the arguments in favour of complete freedom of trade which were urged by Adam Smith and his successors ;[2] for the conversion of the Legislature by these arguments ;[3] and, in these last days, for the reaction in favour of state control, when the possible evils of this complete economic freedom were realized. The result is that the large powers which the Crown, the departments of the central government, or the local government, now possess over the ordering of internal trade, depend on modern statutes.

We shall now see that the powers of the Crown over weights and measures and over the coinage have, from an early date, been shared, and, to some extent, shaped by the Legislature ; and that to-day they also depend almost entirely upon modern statutes.

(ii) Christian, Blackstone's editor, very justly remarks upon the very small part which the royal prerogative has had in the regulation of weights and measures.[4] In fact, the part paid by the prerogative has, from the twelfth century onwards, been in practice confined to the appointment and supervision of persons entrusted with the duty of enforcing the statutes passed to effect this regulation, and to the prosecution of offences against them.

From a very early period the Legislature has attempted to enforce the ideal of uniformity in weights and measures throughout the kingdom. The attainment of this ideal was attempted by some of the Saxon kings ;[5] but the first law within the time of legal memory which attempted to realize it was a statute of 1197.[6] It would seem that the King made money by allowing merchants to disregard this statute ;[7] and the principle of uniformity was again laid down in Magna Carta in 1215[8] and

[1] Vol. vi 341, 355-360 ; vol. xi 466-469.
[2] Vol. xi 501-514.
[3] Ibid 517-518.
[4] Bl. Comm. i 276 n. (16).
[5] Laws of Edgar II 8 (Thorpe i 269-270), " And let one money pass throughout the king's dominion ; and that let no man refuse : and let one measure and one weight pass ; such as is observed at London and at Winchester " ; below 405 n. 1.
[6] Hoveden (R.S.) iv 33-34.
[7] " Mercatores effecerunt adversus praedictos justitiarios, quod panni eorum non capiebantur et quod diutius non teneret assisa illa Ricardi regis, neque de latitudine pannorum, neque de mensuris bladi ; et ut liceat eis de caetero facere pannos suos latos vel strictos sicut eis placuerit. Unde praedicti justitiarii magnam adepti sunt pecuniam ad opus regis, in damnum multorum. Vitanda est turpis lucri causa," ibid 172.
[8] " Una mensura vini sit per totum regnum nostrum, et una mensura cervisiae, et una mensura bladi, scilicet quarterium Londoniense, et una latitudo pannorum tinctorum et russettorum et halbergettorum, scilicet duae ulnae infra listas ; de ponderibus autem sit ut de mensuris," § 35.

1225.[1] All through the Middle Ages it was repeatedly asserted by the Legislature;[2] and only a very few local or other exceptions were allowed.[3] But as Coke said, it "never could be effected, so forcible is custom concerning multitudes, when it hath gotten an head."[4] A statute of 1670[5] and statutes of the eighteenth century[6] testify to the existence of a variety of measures; in 1790 it was said in a debate in the House of Commons that "an acre is not an acre, nor a bushel a bushel, if you travel but ten miles";[7] and cases of 1789, 1792, and 1795 attempted to justify local or customary variations from the standard weights and measures fixed by the Legislature.[8] In 1820 the long list of local and customary terms in use for different weights and measures in different parts of the United Kingdom, which were collected by the commissioners who reported on weights and measures,[9] and the provisions of later statutes,[10] show that, as late as the first quarter of the nineteenth century, uniformity had by no means been attained. As Dr. Hubert Hall has truly said, "There is probably no equally remarkable example of the continuous failure to enforce injunctive or prohibitive legislation in respect of a subject of profound constitutional, economic, and social importance."[11] Uniformity has now been attained, as the result, partly of the legislation of the latter part of the nineteenth century, partly of the more efficient machinery put at the disposal of the central and local government by the Legislature, and partly of the standardization which machinery, and the economic changes produced by machinery, have brought about.

[1] § 25.

[2] See 14 Edward III Stat. 1 c. 12; 25 Edward III Stat. 5 cc. 9 and 10; 27 Edward III Stat. 2 c. 10; 13 Richard II Stat. 1 c. 9; 16 Richard II c. 3; 1 Henry V c. 10; 8 Henry VI c. 5.

[3] Different measures were allowed in the county of Lancaster, 13 Richard II Stat. 1 c. 9; different weights for tin were allowed in Devon and Cornwall, 11 Henry VII c. 4 § 9; the separate measure called water measure was allowed in certain places, 16 Charles I c. 19 § 7, but this permission was revoked in 1670, 22 Charles II c. 8 § 2.

[4] Second Instit. 41; a case of 1307 shows that the mayor and corporation of London sought to justify disobedience to the provisions of the Carta Mercatoria of 1303 as to the mode of weighing goods on the ground that it was contrary to the liberties and customs of the City, Select Cases Concerning the Law Merchant (S.S.) ii 76-78.

[5] 22 Charles II c. 8 preamble.

[6] It is provided by 31 George III c. 30 § 83 that corn inspectors were to compare the Winchester bushel, by which, under § 82, corn was to be measured, with "the measure commonly used in the city or town for which he is appointed inspector"; cp. 10 George III c. 39 § 1, 29 George III c. 58 § 20, and the comment on these statutes made *arg.* in The King v. Major (1792) 4 T.R. at p. 751.

[7] Parlt. Hist. xxviii 322.

[8] Noble v. Durell (1789) 3 T.R. 271; The King v. Major (1792) 4 T.R. 750; The Master of St. Cross v. Lord Howard de Walden (1795) 6 T.R. 338.

[9] Parlt. Papers, 1820, vii 477-509.

[10] 5 George IV c. 74 preamble; 5, 6 William IV c. 63 §§ 6 and 7.

[11] Select Cases Concerning the Law Merchant (S.S.) ii xlv.

The expedients which the Legislature has adopted to secure uniformity in weights and measures have differed from age to age; but, since in all ages the problem has been the same, we can see in these expedients some very constant features.

In the first place, it has, from the earliest period, been found necessary to create standard weights and measures, by reference to which the correctness of the weights and measures actually in use can be judged; [1] for,

> as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or standard: which standard it is impossible to fix by any written law or oral proclamation; for no man can, by words only, give another an adequate idea of a foot rule or a pound weight. It is therefore necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which, all weights and measures may be reduced to one uniform size.[2]

Hence at all periods—from Richard I's law [3] to the Weights and Measures Act 1878 [4]—provision has been made for the making and preservation of standards, by reference to which the correctness of the weights and measures in actual use can be tested. In earlier days standards were kept by the central government in the Exchequer,[5] and others were entrusted to those cities and boroughs which were the commercial centres of their districts.[6] To-day imperial standards are kept by Board of Trade, and local standards by the county and borough councils.[7]

In the second place, it has at all periods been found necessary to entrust the administration of the statutes to special officials. In the Middle Ages the central government was represented by such officials as the clerks of the market of the King's household [8]

[1] The Charter of William I § vii (Thorpe i 491), "Et quod habeant per universum regnum mensuras fidelissimas et signatas, et pondera fidelissima et signata, sicut boni predecessores statuerunt"; this comes from the expanded charter of a later date, P. and M. i 76 n. 1; but this clause may have represented a tradition which came from the days of the Saxon kings, who had legislated concerning weights and measures, above 403 n. 5; the legislation against false weights and measures, Laws of Ethelred V 24, VI 28 (Thorpe i 311, 323), and directions to rectify weights and measures, Laws of Ethelred VI 32, Laws of Cnut (Secular) 9 (Thorpe i 323, 381), presuppose the existence of weights and measures of standard correctness.

[2] Bl. Comm. i 274.

[3] Above 403; in the weights and measures office in the Exchequer there is a bushel measure of the year 1091, Parlt. Papers, 1849, vol. xxviii 607; below 406 n. 9.

[4] 41, 42 Victoria c. 49.

[5] See 14 Edward II Stat. 1 c. 12; 16 Richard II c. 3; below 406 n. 9; apparently other standards were kept in the Marshalsea, and used by the clerk of the market who was at first the deputy of the knight marshal, Select Cases Concerning the Law Merchant (S.S.) ii xlvi, xlix, l.

[6] See 14 Edward III Stat. 1 c. 12; 11 Henry VII c. 4; Select Cases Concerning the Law Merchant (S.S.) ii xlvi, xlix.

[7] 41, 42 Victoria c. 49 §§ 4-9, 34, 40.

[8] 16 Richard II c. 3; vol. i 150; Fleta, Bk. II c. 8, and c. 12 §§ 13-31; Select Cases Concerning the Law Merchant (S.S.) ii xlvi, li.

and the King's aulnager.[1] The local administration of the law was provided for either by the borough authorities and the justices of the peace,[2] or by persons to whom the powers of the clerks of the market had been granted as a franchise.[3] The office of the King's aulnager was abolished in 1700;[4] and the attempt to make the clerk of the market of the King's household a central authority to supervise weights and measures, and to supervise and enforce the administration of other laws connected with manufacture and trade, was brought to an end by the legislation of the Long Parliament. The activities of the clerk of the market of the King's household were confined to the limits of the court and its verge;[5] and the enforcement of the statutes regulating weights and measures was left to the local authorities.[6] In 1795 provision was made for the appointment of inspectors by these authorities;[7] and in 1824 the law was amended and restated by a statute which repealed a large number of the older statutes.[8] All the functions left to the central government—functions which were performed in the weights and measures office in the Exchequer—were powers and duties connected with the use and custody of the standards of weights and measures preserved in the Exchequer.[9] These powers have now passed

[1] He was an official who supervised the cloth trade, vol. iv 359, and n. 5; for a case of 1291 which turned on the right to appoint these aulnagers see Select Cases Concerning the Law Merchant (S.S.) ii 52-53.

[2] See 11 Henry VII c. 4 §§ 2 and 3; 16 Charles I c. 19 § 2; Richard I in 1197 had provided that in each city or borough four or six legal men be appointed to see to the observance of the assize, Hoveden (R.S.) iv 34; cp. Select Cases Concerning the Law Merchant (S.S.) ii xlv.

[3] Vol. i 150; 14 Edward III Stat. 1 c. 12, which appointed surveyors of measures, provided that their appointment should not affect the powers of the clerk of the market, "nor that the lords of franchises shall be ousted of their franchises by the occasion of this statute"; these franchises were recognized in 1643, 16 Charles I c. 19 § 3, in 1815, 55 George III c. 43 § 12, and in 1878, 41, 42 Victoria c. 49 §§ 67-69.

[4] 11, 12 William III c. 20 § 2; Bl. Comm. i 275.

[5] 16 Charles I c. 19 § 3; for the verge see vol. i 208.

[6] Vol. iv 360; Cunningham, Industry and Commerce ii 205.

[7] 35 George III c. 102. [8] 5 George IV c. 74.

[9] Mr. John Bowen gave the following evidence to the Royal Mint Commission, which reported in 1849, Parlt. Papers, 1849, xxviii pp. 607-608: "The business and functions of the Weights and Measures Office have been performed from time immemorial at the Royal Exchequer, and are a remnant and relic of the ancient Royal Exchequer. . . . In the Weights and Measures Office are deposited for custody ancient standard weights and measures, one of which is a bushel of so early a date as 1091, and also copies, multiples, and parts of the standards prescribed by the Act 5 Geo. IV c. 74, which may now be conveniently called the 'Exchequer standards,' and which practically govern and regulate all the weights and measures in common use . . . by means of verified copies issued from the Exchequer as local standards. . . . It is the peculiar function of the office to verify such copies of the Exchequer standards, as the Lord High Treasurer or the Commissioners of the Treasury may from time to time direct to be sent to any place or person in His Majesty's dominions or elsewhere"; in 1758 and 1759 committees of the House of Commons said that the then existing Exchequer standard weights and measures were very inaccurate, and disagreed with those kept at the Guildhall and the Mint,

to the Board of Trade,[1] which also examines applicants for the post of local inspector,[2] and decides disputes between inspectors and the public.[3] These inspectors are appointed by the local authorities from amongst candidates who hold a Board of Trade certificate.[4] And thus the necessary measure of central control and supervision, which mediæval parliaments [5] and the earlier Stuart kings [6] tried, without much success, to introduce and to make effective, has at length been introduced and made effective by the legislation of the nineteenth and twentieth centuries.

(iii) Uniformity in the coinage is as important to trade as uniformity of weights and measures. But, throughout its history, the coinage has been far more closely associated with the prerogative of the Crown than the analogous topic of weights and measures.

One of the laws of Ethelred provided that no one should have a moneyer save the King ; [7] and the Leges Henrici Primi provided that the coining of false money should be a plea of the Crown.[8] The barons in Stephen's reign usurped this prerogative ;[9] but, in accordance with the terms of the treaty of Wallingford, it was resumed by Henry II, who issued a uniform coinage [10] which all must accept.[11] Thus uniformity in the coinage was re-established, and the principle reasserted that " the legitimation of money and the giving it its denominated value is justly reckoned *inter jura majestatis*, and in England it is one special part of the King's prerogative." [12] So established a principle was it that it was, unhistorically, assigned in 1568 as one of

Parlt. Hist. xxviii 319-320 ; the Weights and Measures Office also had the custody of the troy weights provided for trials of the pyx (below 410), and of the horses-hoes and hobnails annually produced in the court of Exchquer when the sheriffs of London are sworn in, see vol. i 237 n. 6 ; Personal Remembrances of Sir F. Pollock ii 269-270 ; L.Q.R. xliv 44-46.

[1] 41, 42 Victoria c. 49 § 33. [2] 52, 53 Victoria c. 21 § 11.

[3] 4 Edward VII c. 28 § 7 (1). [4] Ibid § 8 (2).

[5] 14 Edward III Stat. 1 c. 12 cited above 406 n. 3.

[6] Vol. iv 359-360.

[7] Laws of Ethelred III 8 (Thorpe i 297) ; for other provisions as to the coinage in the Saxon laws see Stubbs, C.H. i 237 n. 5, 427 n. 4.

[8] Leg. Henr. 10 1. [9] William of Newbury i 22 ; Hale, P.C. i 199.

[10] Stubbs, C.H. i 377-378 ; Ralph de Diceto i 297, cited Stubbs, C.H. i 378 n. 2, says, " forma publica percussa eadem in regno celebris erit ubique moneta " ; Henry II also issued a new coinage in 1180, Benedictus Abbas i 263 ; Stubbs, C.H. i 549 and n. 5.

[11] " At postquam rex illustris, cujus laus est in rebus magnis excellentior, sub monarchia sua per universum regnum unum pondus et unam monetam instituit, omnis comitatus una legis necessitate teneri et generalis commercii solutione coepit obligari," Dial. de Sca. I c. 3.

[12] Hale, P.C. i 188 ; Bl. Comm. i 276. I think that Stubbs, C.H. ii 594 somewhat exaggerates the extent of the Parliamentary control over the coinage ; the statute of 1343, 17 Edward III c. 6, is little more than a general declaration that good money shall be made, and the ordinance of the Lords Ordainers in 1311, forbidding the King to alter the coinage without consulting Parliament, was, as Hale points out (P.C i 194-195), repealed " and never revived again " ; but Stubbs's view has the authority of Coke, below 408.

the reasons why the law gave to the King his prerogative rights in respect of all mines of gold and silver.[1] It is true that it was long before one central royal mint was established.[2] "By special charter or usage divers prelates and monasteries in England had a certain number of stamps for the coinage of money."[3] But they only coined money as the King's agents, and the king dictated the fineness, the denomination, and the inscription on the coins, and tested their quality.[4]

We must now consider (*a*) the extent of the Crown's prerogative in relation to the coinage; and (*b*) the method used by the Crown to ensure that the coins which it issues are of the right weight and fineness.

(*a*) Hale sums up the extent of the Crown's prerogative under the following heads: "in the first institution of any coin within this kingdom the King, and the King alone, sets the weight, the alloy, the denominated value."[5] The King by proclamation may legitimate foreign coin.[6] He may enhance or debase the denomination of the coin; or, he may debase its material, while still keeping up its denomination.[7] He may decry, that is put out of use, money already current.[8] The only question which was doubtful when Hale wrote, was the question whether Coke was right in his opinion that statutes of 1352[9] and 1421[10] had made it legally necessary that all money must be either of gold or silver of a certain standard of fineness, and had made it illegal for the Crown to issue money below that standard.[11] Hale points out[12] that this opinion is contrary to the decision of the Irish courts in 1605, in the case of mixed money,[13] that attempts made to restrain the King's power without the consent of Parliament were not successful, that Henry VIII and Edward VI had debased the coin, and that Charles II had sanctioned the issue of copper coins.[14] He admits that it is

[1] The Case of Mines (1568) Plowden at pp. 315-316; for the royal rights over mines see vol. i 151-153.

[2] Below 410, 505. [3] Hale, P.C. i 191.

[4] Ibid 191-192; Madox, Exchequer (ed. 1711) 199-200 and n. (c)—a record of 1319 directing the trial of money coined by the Abbot of St. Edmund.

[5] P.C. i 191.

[6] Ibid i 192; in 1705 Northey, the attorney-general, gave an opinion to this effect, Chalmers, Opinions of Eminent Lawyers ii 322.

[7] P.C. i 192. [8] Ibid 197-198.

[9] 25 Edward III Stat. 5 c. 13. [10] 9 Henry V Stat. 2, c. 6.

[11] Second Instit. 577—"By this act (25 Edward III Stat. 5 c. 13) three things are to be observed: 1. that the money of England must either be of gold or silver: 2. that the current money of England cannot be impaired either in weight or in alloy: 3. that the alloy of sterling was the ancient current money of England. And herewith agreeth the statute of 9 H. 5."

[12] P.C. i 193-195. [13] Davis, Reports, 18-28.

[14] "While I wrote this a proclamation hath issued dated 16 Aug. 1672, whereby copper coin of halfpence and farthings near the intrinsic value is proclaimed," P.C. i 195.

"neither safe nor honourable for the King to imbase his coin below sterling," and that, if it is done, "it is fit to be done by assent of Parliament"; but he comes to the conclusion that, though "fieri non debuit, factum valet."[1] This conclusion was probably correct in theory; and in practice Hale is obliged to admit, in the then state of the law, that, whatever the statutes might say, they could be dispensed with by proclamation.[2] When Blackstone wrote the dispensing power no longer existed,[3] and he inclines to Coke's opinion.[4] But, with some inconsistency, he maintains that the King may "legitimate foreign coin, and make it current here"[5]—though that, as Hale points out,[6] could only be done by a proclamation which dispensed with a statute of 1394.[7]

It would thus appear that, at the beginning of the eighteenth century, the prerogatives of the Crown in relation to the coinage were subject to very little control. But there were signs that Parliament was beginning to supplement and regulate these prerogative powers. In 1666 an Act to encourage the coinage prescribed the amount of coined money which was to be given in exchange for gold and silver brought to the mint to be coined.[8] In 1695[9] and 1696[10] statutes were passed to deal with the problems which arose out of the calling in of clipt and defective coinage, and the recoinage which was then being undertaken.[11] In 1707, a proclamation made by Anne in 1704, as to the rates at which foreign coins were to be received in America, was enforced by statute.[12] In 1774 statutory provisions were made to supplement the royal proclamations which directed a recoinage of gold,[13] and to regulate the weights to be used in weighing gold and silver coin.[14] Another statute of the same year[15] (the only eighteenth-century statute on this topic mentioned by Blackstone)[16] prohibited the importation of light coins of the realm, and regulated the conditions under which silver was to be legal tender. In 1816 an Act was passed to regulate a new silver coinage, and the extent to which silver should be a legal tender.[17] In 1825 an

[1] P.C. i 194.

[2] Ibid 197; for the state of the law as to the dispensing power see vol. vi 220-221, 223-225.

[3] Ibid 240-241.

[4] "And of this sterling or esterling metal all the coin of the kingdom must be made, by the statute 25 Edw. III c. 13. So that the king's prerogative seemeth not to extend to the debasing or inhancing the value of the coin, below or above the sterling value: though Sir Mathew Hale appears to be of another opinion," Comm. i 278.

[5] Ibid.

[6] P.C. i 197.

[7] 17 Richard II c. 1.

[8] 18 Charles II c. 5.

[9] 7, 8 William III c. 1.

[10] 8 William III cc. 1 and 2.

[11] Vol. vi 324-325.

[12] 6 Anne c. 30 (R.C. c. 57); cp. House of Lords MSS. vii p. 230 no. 2402.

[13] 14 George III c. 70.

[14] Ibid c. 92.

[15] Ibid c. 42.

[16] Comm. i 277.

[17] 56 George III c. 68.

Act was passed to assimilate the currencies of Great Britain and Ireland.[1] In 1863 [2] and 1866 [3] Acts were passed to enable the Crown to declare gold coins, issued from colonial branch mints, legal tender. The way was thus prepared for the Coinage Act 1870 [4] which prescribes *inter alia* the weight and fineness of coins made at the mint,[5] the coinage of bullion brought to the mint,[6] and the large number of matters relating to the coinage which the Crown may still regulate by proclamations issued with the advice of the Privy Council.[7] The Act also provides that the Board of Trade shall have the custody of standard trial plates and standard weights, and that they shall be periodically verified by the Board of Trade.[8] This provision of the Act leads us to the consideration of the second of the topics relating to the coinage with which I propose to deal—the method used by the Crown to ensure that the coins which it issues are of the right weight and fineness.

(*b*) From a very early period the Crown provided for supervision of the work turned out by its mints, or by the few mints which, in the Middle Ages, were still in private hands.[9] Of the royal mint, and the many mediæval characteristics which it, in common with many of the other departments of state, retained down to the nineteenth century, I shall say something later.[10] Here it will be sufficient to say that, in the Middle Ages, the master of the mint contracted by indenture with the King, to make so many coins of a specified weight and fineness, for a consideration therein stated.[11] It was necessary, therefore, for the King to institute tests to see that the master of the mint had fulfilled his contract. This was the origin of what is known as "the trial of the pyx." The word pyx means box. A certain number of the coins, as soon as they were minted, were placed in a box, and these coins were tested.[12] From a very early date the King made use of the goldsmiths' company to conduct these tests; [13] and, in the sixteenth century, the Crown, in pursuance of its policy of entrusting the trading companies with powers to supervise matters falling within the scope of their trade,[14] made the company the judge of the purity of the coinage. If the coin satisfied the tests, it was considered that the master of

[1] 6 George IV c. 79. [2] 26, 27 Victoria c. 74.
[3] 29, 30 Victoria c. 65. [4] 33 Victoria c. 10. [5] § 3.
[6] § 8. [7] § 11. [8] §§ 16 and 17.
[9] Madox, Exchequer 198-200; above 408.
[10] Below 505. [11] Hale, P.C. i 191; below 411 n. 1.
[12] See Madox, Exchequer 198 n. (a), 200 n. (c).
[13] Prideaux, Memorials of the Goldsmiths' Company i xxv; and, on the whole subject, see an article on The Office of the King's Remembrancer, L.Q.R. xliv 46-50.
[14] Vol. iv 321-322

the mint had satisfied the obligations of his indenture.[1] The trial was conducted by a jury of the freemen of the company, summoned by the wardens, and they gave in their verdict to the Lord Chancellor.[2] The procedure is now regulated by the Coinage Act 1870, which provides for annual trials, which take place in the Goldsmiths' Hall, and are presided over by the King's remembrancer.[3] The practice is thus described by Sir Walter Prideaux: [4]

> The mint officials are by law bound to place in the Pyx for the use of the jurors at such trial one coin out of every 15 lbs. troy weight of gold coins, technically called a "journey," and one coin out of every 60 lbs. weight of silver coins. These coins are sealed up in dated packets, with the money values of the contents endorsed, and are so produced to the jury at the trial. . . . The verdict is in the nature of a certificate to the master and deputy-master of the mint for the due discharge by them of the responsible functions of their office.

Sir Frederick Pollock's father, who, as Queen's Remembrancer, presided at many of these gatherings, tells us that

> the precision to which the purity of the gold and silver coinage, in accordance with the prescribed standards, has been brought is a marvel of accuracy; and during all the time that I had to sign and return the verdict of the Pyx jury to the Treasury, it went on improving till there was no further room for improvement.[5]

The existence of this procedure is a striking illustration of two salient features of English constitutional law. In the first place, it is an instance of the way in which, in the course of the long history of English law, mediæval institutions and expedients have been adapted to modern needs. In the second place, it is an instance, in a small sphere, of the way in which separate institutions, each possessed of considerable internal autonomy, were used to check one another. What other nation would have used a chartered company to check the operations of a government department, the functions of which have always been considered to be, as Hale said, *inter jura majestatis?*

(3) The King is a constituent part of the Legislature; "and, as such, has the prerogative of rejecting such provisions in

[1] "This duty . . . had for its immediate object the giving an acquittance to the mint master, who was then bound to the Crown by indentures to coin money of the prescribed fineness and weight," Prideaux, loc. cit.

[2] Ibid; Prideaux tells us that, "in earlier years the Sovereign himself occasionally presided. Thus, in 1611 James I, and in 1669 Charles II, performed this office, and in 1673 Prince Rupert (who is said to have been an accomplished chemist) was present," op. cit. i xxv-xxvi; cp. L.Q.R. xliv 48-49.

[3] 33 Victoria c. 10 § 12; see Personal Remembrances of Sir F. Pollock ii 272-273.

[4] Op. cit. i xxv.

[5] Personal Remembrances of Sir Frederick Pollock ii 273.

Parliament, as he judges improper to be passed." [1] No principle of constitutional law is better established than this, for, in 1661, Parliament enacted that all persons who maintained that " both Houses of Parliament or either House of Parliament, have a legislative power without the King," should incur the penalty of a præmunire.[2] It was to this principle that the King is " a constituent part of the Legislature "—to the fact that the executive thus forms a part of the legislative power—that Blackstone ascribed the most efficacious of those checks and balances, in the existence of which he found the secret of the excellence of the British constitution.[3] It was in this principle that he saw the best designed of those links between the executive and the Legislature which helped to preserve the balance of the constitution.[4]

It is obvious that the existence of some link is necessary for the smooth working of any constitution, in which the powers of government are divided between different organs, all of which have a large amount of independence and autonomy. The royal prerogative was the principal link in the eighteenth-century constitution. But we shall see that, by the end of the century, causes were at work which, while preserving that link, were tending to alter its character and the mode of its operation, by making it less distinctly royal; [5] and that, in the following period, the evolution of the system of cabinet government completed that development, by giving to ministers approved by a majority of the House of Commons the control over the exercise of the prerogatives of the Crown for so long a period as they retain that approval. Their control over these prerogatives gives the ministers the power to carry on the executive government while they remain ministers; the power of the Crown to dismiss its ministers at pleasure makes it possible to get rid of them when they cease to command a majority in the House of Commons; and the power of the Crown to dissolve Parliament at its pleasure gives ministers the power to appeal from a hostile majority in the House of Commons to the electorate.

It is the development of the system of cabinet government which has rendered this prerogative of the Crown to reject bills obsolete. The last instance of its exercise was in 1707, when Anne rejected the Scotch militia bill.[6] But both the development of the system of cabinet government, and the recognition of the fact that the Crown's prerogative to reject bills was obsolete, were slow. This prerogative was not regarded as

[1] Bl. Comm. i 261.
[2] 13 Charles II Stat. 1 c. 1 §§ 2 and 3.
[3] Bl. Comm. i 154-155; below 716.
[4] Bl. Comm. i 154.
[5] Below 642-643.
[6] Anson, Parliament (2nd ed.) 287.

entirely obsolete in the eighteenth century.[1] There were several reasons for this fact. First, the statute of 1661 [2] and the causes which led to its enactment, and the action of Anne in 1707, were nearer to the statesmen of the eighteenth century than they are to us—nearer not only chronologically, but also politically; for cabinet government was as yet in the incipient stages of its growth,[3] and the King had very considerable personal influence upon the policy of his government.[4] Secondly, this prerogative was actively used in relation to colonial legislation in the eighteenth century and later, because the royal veto meant not merely the personal disapproval of the King, but the disapproval of the cabinet; [5] and in relation to colonial legislation, though it gradually decayed as the greater Dominions became more and more independent, it was an existing prerogative throughout the nineteenth century. Thirdly, that the King made no use of his prerogative to reject bills sent up by the Parliament of Great Britain was, as we shall see, due, partly to the fact that he and his ministers had many means of influencing the House of Commons,[6] and more especially to the fact that they were generally able to induce the House of Lords to reject bills of which they disapproved.[7] As the authors of *The Federalist* said,[8] the disuse of the Crown's power to reject bills "is to be ascribed wholly to the Crown's having found the means of substituting influence to authority, or the art of gaining a majority in one or other of the two Houses, to the necessity of exerting a prerogative which could seldom be exerted without hazarding some degree of national agitation." In 1743 the Earl of Ilay said: [9]

The Crown is not, I know, to appear by petition or message against any bills depending in this House, because the king may refuse his assent, and thereby prevent the bill from being passed into a law; but when those who have the honour to serve the Crown find a bill brought into this House, which they think the king ought not to give his assent to,

[1] See a speech of the Earl of Ilay in 1743, Parlt. Hist. xiii 93, cited below n. 10; in 1784 it was said that "the prerogative of putting a stop to any bill by a negative was grown obsolete, but not given up," ibid xxiv 362; in 1788 Lord Loughborough agreed that this was an essential prerogative; but, he said, he could imagine only one possible case in which it would be right to exercise it—if both Houses attacked the rights of the Crown in a manner "so repugnant to the sense and feelings of the people at large, that the king's pronouncing his negative on such a bill . . . should be considered a popular execution of his prerogative," ibid xxvii 883.

[2] 13 Charles II Stat. 1 c. 1 §§ 2 and 3.

[3] Below 636-642.

[4] Below 637-638.

[5] Vol. xi 56, 82, 93-98.

[6] Below 577-580.

[7] Below 607.

[8] No. lxviii; cp. no. lxxii where it is said that the Crown would hesitate "to put a negative upon the Joint Resolutions of the two Houses of Parliament. He would not fail to exert the utmost resources of his influence to strangle a measure disagreeable to him, in its progress to the throne, to avoid being reduced to the dilemma of permitting it to take effect, or of risking the displeasure of the Nation, by an opposition to the sense of the Legislative body."

[9] Parlt. Hist. xiii 93.

it is certainly their duty to oppose the bill in its progress, and to endeavour to have it rejected by the House, in order to prevent their sovereign's being subjected to the invidious task of refusing it the royal assent.

Though this course was said by Fox in 1784,[1] and by the Marquis of Lansdowne in 1792,[2] to be unconstitutional, it was, as the authors of *The Federalist* pointed out,[3] well recognized; and it was undoubtedly politic. It diverted the odium of rejecting bills, which the House of Commons had approved, from the Crown; and it had the salutary result of making the evolution of the modern system of cabinet government more gradual and peaceful than would otherwise have been possible.

(4) "Another capacity, in which the King is considered in domestic affairs, is as the fountain of justice and general conservator of the peace of the kingdom."[4] This capacity of the King has given rise to certain prerogatives, and also to certain characteristics of the English judicial system, which can be summarized as follows: (i) the King "has alone the right of creating courts of judicature."[5] We shall see that this prerogative is important chiefly in relation to colonial constitutional law, and that it has become limited to a right to erect only courts which possess a common law jurisdiction.[6] (ii) "Hence it is that all jurisdictions of courts are either mediately or immediately derived from the Crown, their proceedings run generally in the King's name, they pass under his seal, and are executed by his officers."[7] We have seen that this was true in theory in Bracton's day;[8] and that the decadence of the communal, feudal, manorial, and small franchise jurisdictions,[9] the effect of the legislation of the sixteenth century upon the Palatinate and larger franchise jurisdictions,[10] and the effect of the legislation of the eighteenth and nineteenth centuries,[11] have made this statement even more true than when Blackstone wrote. (iii) "All offences are either against the King's peace or his Crown and dignity; and are so laid in every indictment."[12] The Norman and Angevin kings had begun the process of making the King's peace permanent and universal throughout England.[13] They had used this con-

[1] "The prerogative of the negative is a maxim which I have always admitted, always asserted, always defended. Who doubts it? I for one never have. And had his prerogative on a late occasion been exerted, not in the dark and under the baleful shade of a secret influence, but in an honest, open, and avowed manner, I should have applauded the measure," Parlt. Hist. xxiv 366-367.

[2] Ibid xxix 1526.
[3] Above 413 and n. 9.
[4] Bl. Comm. i 266.
[5] Ibid 267.
[6] Vol. xi 265-267.
[7] Bl. Comm. i 267.
[8] Vol. i 87.
[9] Ibid 72-75, 81, 178-179, 187.
[10] Ibid 112, 115, 124-125.
[11] Ibid 190-192.
[12] Bl. Comm. i 268.
[13] P. and M. ii 461-463; Vol. ii 206, 257-258, 358.

ception to attract jurisdiction to their courts ;[1] and as those courts came to be definitely the King's courts, as the old appeals of crime based on the prosecution of the injured person or his relatives were superseded by prosecutions at the King's suit,[2] the King's peace reigned without a rival. (iv) As the result of this development the King got a power to pardon crimes. This prerogative is, as Blackstone rightly says,[3] the result of his control of criminal procedure. It is quite distinct in its nature, as Vaughan, C.J., pointed out in *Thomas v. Sorrel*,[4] from the dispensing power.[5] We shall see that, owing to the defects in the criminal law, it was a very necessary power.[6] The extent to which it was exercised was sometimes criticized ;[7] but it is clear that George III gave very careful personal consideration to the cases which were brought before him.[8] (v) The King appoints the judges of the courts of common law, the justices of the peace, and other officers of justice, just as he appoints other officials of his government.[9] We have seen that, till the Act of Settlement, the judges of the courts of common law could, like other officials, be dismissed at his pleasure ; and that till 1760, like other officials, they vacated their offices on the demise of the Crown.[10]

We have seen that by the end of the mediæval period the King had ceased to decide cases in person in his courts of common law ;[11] and that Coke had laid it down that he could no longer decide them, since he had delegated all his judicial power to his judges.[12] The sole survival, which remained to recall the days when the King could and did administer justice in person, was the legal theory that the King " is always present in all his

[1] P. and M. ii 462 ; cp. Bl. Comm. i 268. [2] Vol. ii 361-364.
[3] Comm. i 468-469. [4] (1674) Vaughan at p. 333, cited vol. vi 218 n. 1.
[5] Vol. vi 217-218. [6] Vol. xi. 559, 560, 562-563. [7] Ibid 564.

[8] Thus the King writes in 1766: " I have examined the case of the unhappy Convicts lately transmitted from Scotland ; as to the Young Man I am very willing to Shew mercy, as to the Woman, I cannot see it quite in the same light, but think it may not be improper to send to the proper Office in Scotland for a Report with regard to the Woman, as I am ever desirous to be perfectly convinc'd there is no room for mitigating the rigour of the Law, before it takes its course," Fortescue Correspondence of George III i 395 ; cp. ibid i 507 ; ibid ii 373-374, 374-375, 379, 380-381.

[9] Bl. Comm. i 267 ; below 418, 453-454.

[10] Vol. i 195 ; vol. vi 234 ; 12, 13 William III c. 2 § 3 ; 1 George III c. 23 ; 6 Anne c. 7 § 8 had provided that the judges and certain other officers of the Crown should hold their offices for six months after the demise of the Crown ; Sir Michael Foster thought that when the judges began to be appointed during good behaviour, they ceased to vacate their offices on the demise of the Crown, Campbell, Chancellors v 149 ; the Act of George III removed all doubts as to this. It would seem that if a judge is guilty of misconduct a writ of scire facias would lie to repeal his patent, and, if his conduct amounted to a misdemeanour, he could be proceeded against by information ; and that in both cases conviction would entail loss of his office, Todd, Parliamentary Government in England (2nd ed.) ii 859-860.

[11] Vol. i 207.

[12] Vol. v 430 ; The Case of Prohibitions (1608) 12 Co. Rep. 63.

courts "[1]—a theory which gave rise to certain rules relating to the King's suits which helped to swell the large mass of procedural advantages and privileges enjoyed by him.[2] The fact that the King had thus withdrawn from his courts of common law gave the judges, in practice, a large amount of independence, and the subject some security against the exercise of arbitrary power. Throughout the Middle Ages and the Tudor period the judges, though generally only holding office at the pleasure of the Crown, showed considerable independence in upholding the rights of the subject against official arbitrariness.[3] This was due mainly to the survival of the mediæval idea that the law which they administered was supreme, and governed the actions of both the King and his subjects,[4] and partly to the survival of the archaic idea that the law is declared and made by the court, and not by the King or other lord in whose name the court is held.[5] To this attitude of the judges was largely due the reverence which all classes felt for the common law.[6] But the constitutional controversies of the Stuart period had made it necessary for the King to appoint judges whom he could influence ;[7] and he found it more especially necessary to pursue this course after the Restoration, because the court of Star Chamber, and other courts with a similar jurisdiction, had been abolished. The judicial appointments made by Charles II in the later years of his reign, and the appointments and dismissals of judges made by James II, were scandalous.[8] The Act of Settlement, supplemented by the Act of 1760, restored to the judges all and more than all their old independence ;[9] and thus was introduced another of those checks and balances to which Blackstone rightly attributed the secret of the excellence of the British constitution.

Just as the King was a check upon Parliament, and Parliament upon the King ;[10] just as the Houses of Lords and Commons were a check upon one another ;[11] so the courts, presided over by judges enjoying security of tenure, were a check both upon the executive and the Legislature.

[1] Bl. Comm. i 270.
[2] Above 345.
[3] Vol. ii 561-562 ; vol. v 347-348.
[4] Vol. ii. 253-254, 435-436.
[5] Ibid 196 ; we can see echoes of both these ideas in Coke's report of The Case of Prohibitions (1608) 12 Co. Rep. 63—"the law was the golden metwand and measure to try the causes of the subjects, and which protected his majesty in safety and peace" ; and then, on the King saying that this meant he was under the law, Coke, at p. 65, cited Bracton to show that this was so ; "the king in his own person cannot adjudge any case . . . but this ought to be determined and adjudged in some court of justice . . . ; and always judgments are given, *ideo consideratum est per curiam*, so that the court gives judgments," at p. 64.
[6] Vol. ii 417, 435-436, 477 ; vol. v 435.
[7] Ibid 350-355.
[8] Vol. vi 503-511.
[9] Above 415 n. 10.
[10] Above 412 ; below 716.
[11] Below 626-629.

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservation of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative. For which reason by the statute 16 Car. I c. 10, which abolished the court of star chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state.[1]

This is even more true to-day than when Blackstone wrote. Neither the King nor the House of Lords are adequate checks upon the House of Commons; and the majority in the House of Commons tends to obey blindly the dictates of the ministers approved by it—ministers who wield all the prerogatives of the Crown. The courts are thus "the main preservation of public liberty" to a much greater extent than they were in the balanced eighteenth-century constitution. Any curtailment of their jurisdiction means the curtailment of the one security which the subject has against the arbitrary use of the great powers which all parties in the House of Commons vie with one another in conferring upon their leaders, the ministers.[2]

(5) "The King is likewise the fountain of honour, of office, of privilege."[3] He can create new titles and new offices,[4] subject, however, to this qualification,

that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices; for this would be a tax upon the subject which cannot be imposed but by Act of Parliament.[5]

Similarly he can grant "place or precedence to any of his subjects,"[6] subject, however, to the provisions of the statute of 1539, which gives precedence to different ranks of the nobility, and to certain great officers of state.[7] He can also grant other

[1] Bl. Comm. i 269.
[2] Below 644-649, 723.
[3] Bl. Comm. i 271.
[4] (1612) 12 Co. Rep. 81.
[5] Bl. Comm. i 272; for this Blackstone had the authority of Coke, Second Instit. 533; and Coke had the authority of Y.B. 13 Hy. IV Hil. pl. 11.
[6] Bl. Comm. i 272.
[7] 31 Henry VIII c. 10; Coke says of this statute (Fourth Instit. 361), "King H. 8, though standing as much upon his prerogative as any of his progenitors, yet finding how vexatious it was to himself and how distasteful to his ancient nobility

privileges to his subjects. Thus he can make an alien a denizen, or he can make one or several of his subjects a corporation.[1]

This prerogative to confer honours, offices, and privileges was so used by the Hanoverian kings, and more especially by George III,[2] that it went far to compensate them for the restrictions placed on their prerogatives by the legislation of the earlier half of the seventeenth century, and by the Revolution settlement. If we look at this legislation, says Blackstone,[3] and consider that the Crown must now rely for its revenue on the liberality of Parliament, "we may perhaps be led to think that the balance is inclined pretty strongly to the popular scale, and that the executive magistrate has neither independence nor power enough left to form that check upon the lords and commons, which the founders of our constitution intended." But he points out that this conclusion would be erroneous. Parliament has voted to the King a large hereditary revenue for his life. The existence of the national debt, which involves the raising of a large and a perpetual revenue, necessitates the creation of a multitude of officials with large powers. Since all these officials hold their offices at the pleasure of the Crown, they add enormously to its influence. Moreover, in the management of this national debt and of the revenue levied to pay the interest upon it, there are "frequent opportunities of conferring particular obligations, by preference in loans, subscriptions, tickets, remittances, and other money transactions, which will greatly increase this influence." "And the same may be said with regard to the officers in the army, and the places which the army has erected." Moreover, the army "raised by the Crown, officered by the Crown, commanded by the Crown," puts at its disposal a force which "is more than equivalent to a thousand little troublesome prerogatives." Thus

> whatever may have become of the *nominal*, the *real* power of the crown has not been too far weakened by any transaction in the last century. Much indeed is given up; but much is also acquired. The stern commands of prerogative have yielded to the milder voice of influence; the slavish and exploded doctrine of non-resistance has given way to a military establishment by law; and to the disuse of Parliaments has succeeded a parliamentary trust of an immense perpetual revenue.[4]

It is clear that Blackstone agreed in substance with Burke's dictum that "the power of the Crown, almost dead and rotten as prerogative, has grown up anew, with much more strength and

to have new raised degrees to have precedency of them, and finding that this kind of controversy for precedency . . . hindered the arduous, urgent, and weighty affairs of the Parliament was content to bind and limit his prerogative by Act of Parliament concerning the precedency of his great offices and of his nobility."

[1] Bl. Comm. i 272-273.
[2] Above 88-89; below 577-580.
[3] Comm. i 334.
[4] Bl. Comm. i 335-337.

far less odium, under the name of influence " ; [1] and this opinion was indorsed by Paley.[2]

This influence of the Crown helped it to control the Legislature all through the eighteenth century.[3] It helped therefore to weaken one of the principal checks or balances, provided by the eighteenth-century constitution to prevent the exercise of arbitrary power and undue encroachments on the liberty of the subject.[4] But as yet it had had hardly any effect upon the other principal check or balance which was provided by the independence of the judges.[5] It is true that Blackstone, in a passage which awakens a modern echo, laments that the necessary powers given to the officers of the revenue, had had the effect of increasing the power of the Crown over the property of the people " to a very formidable height " ; [6] and it is true that Dr. Johnson's famous definition of " Excise " nearly drew upon him a prosecution for libel [7] But as yet the causes, which in our own days have operated to introduce the " new despotism " of the officials of the executive government were in embryo.[8] It is true that in 1783 the duke of Richmond tried to maintain that the gift by the Crown of pensions to the judges, of appointments to commissionerships of the great seal, when the great seal was in commission, or of peerages, impaired their independence.[9] But Lord Loughborough spoke truly when he said that this was " an imaginary grievance." [10] The general warrant cases show that there was no more reason to question the independence of the judges then than there is to-day.[11] The result was that in the eighteenth century, the independence of the judges was the best security for the liberty of the subject ; and this is equally

[1] Thoughts on the Cause of the Present Discontents, Works (Bohn's ed.) i 313 ; this development had been noticed in 1740 by the duke of Argyle in a debate on a pension bill ; he said, " Let us consider, my lords, the vast sums of money that are now at the disposal or under the direction of the crown ; the infinite number of lucrative posts, places, and employments, most of them unknown to our ancestors, now dependent upon the sole and arbitrary pleasure of the crown ; and the great variety of feudal laws, by one or other of which the most innocent may be made to suffer, the most cautious may be entrapped, and from which the most guilty may be screened, by virtue of that dispensing and mitigating power, which, with respect to many of them, is now lodged in the officers of the crown," Parlt. Hist. xi 541.

[2] " When we turn our attention from the legal existence to the actual exercise of royal authority in England, we see those formidable prerogatives dwindled into mere ceremonies ; and in their stead, a sure and commanding influence, of which the constitution, it seems, is totally ignorant, growing out of that enormous patronage, which the increased extent, and opulence of the empire has placed in the disposal of the executive magistrate," Principles of Moral and Political Philosophy (2nd ed.) 466-467 ; the existence and use of this influence gave rise to the most important of the eighteenth-century conventions of the constitution, see below 632-634.

[3] Below 579-580. [4] Above 412 ; below 721-722. [5] Above 417.

[6] Comm. iv 281 ; see E. Hughes, Studies in Administration and Finance 328-338.

[7] E. Hughes, op. cit. 328 ; below 454 n. 8 ; vol. xi 284 n. 2. [8] Below 420.

[9] Parlt. Hist. xxiii 959-963. [10] Ibid 975. [11] Below 659-672.

true to-day, though the reason is different; since the danger to liberty is not a King possessed of too much influence over Parliament, but a ministry, wielding all the prerogative powers of the King and backed by a vast bureaucracy able to get what powers it wants from its majority in the House of Commons.

Blackstone shared the ideals and the optimistic outlook of many eighteenth-century statesmen and political thinkers. He looked forward to a time "when by the free operation of the sinking fund our national debts shall be lessened; when the posture of foreign affairs, and the universal introduction of a well-planned and national militia, will suffer our formidable army to be thinned and regulated; and when (in consequence of all) our taxes shall be gradually reduced"; and when, therefore, "this adventitious power of the Crown will slowly and imperceptibly diminish, as it slowly and imperceptibly rose."[1] This was the ideal of a man who looked at politics from the point of view of a Revolution Whig. Blackstone did not see that, even when he was writing these words, causes were beginning to operate which were making this point of view antiquated. Still less could he foresee that those causes would go on operating with increasing intensity in the succeeding years. The struggle for national existence against Napoleon, and the social and economic problems created by the industrial revolution, entailed vast increases in the national debt, vast increases in the naval and military forces of the Crown, and vast increases in taxation. An ever-increasing elaboration in the machinery of government, central and local, necessarily followed; and that, in its turn, created the need for the systematic reform of all branches of government. These changes were fatal to that balanced eighteenth-century constitution which Blackstone and many other eighteenth-century statesmen and lawyers so much admired. The influence of the Crown, which Blackstone and Burke deplored, continued to increase. It gradually ceased, indeed, to be wielded by the King; and when, after 1832, the system of cabinet government attained its modern form, it passed, almost entire, to the King's ministers, so long as they retained their majority in the House of Commons.

(6) "The King is, lastly, considered by the laws of England as the head and supreme governor of the national church."[2] We have seen that the prerogatives which the King acquired in this capacity—prerogatives which included the right to summon and dissolve convocation, the control over the ecclesiastical courts which administered the King's ecclesiastical law, the right to appoint archbishops and deans and the patronage of

[1] Comm. i 337. [2] Bl. Comm. i 279.

many livings—resulted from the Reformation settlement made by Henry VIII and Elizabeth.[1] At this point it is not necessary to say anything in detail of these prerogatives. But it is necessary to say something of the effect which their existence had upon the constitution in the eighteenth century. This is a matter of which Blackstone does not speak—of which, indeed, if he had spoken, he could not, because he was a contemporary, have spoken adequately.

I have pointed out that, as the result of the Revolution, religion gradually ceased to exercise that dominating influence upon politics which it had exercised all through the seventeenth century.[2] That the attainment of this result was very largely due to the possession by the Crown of these ecclesiastical prerogatives is clear from the course of eighteenth-century ecclesiastical history.

The schism of the non-jurors,[3] and the events of Anne's reign,[4] had shown that the politics of the clergy were deeply tinged with Jacobitism; and the power of the clergy was immense.

> Monopolizing, as it did, by its command of the universities, the higher education, and attracting by its great rewards a very large proportion of the talent of the country, its power in an age when there was very little serious scepticism among the educated, and no considerable rival organization among the poor, appeared almost irresistible. The Church was the natural leader of the country gentry and the peasants. Its influence ramified through all sections of society. Its pulpits were to thousands the sole vehicle of instruction.[5]

Both William III and the Hanoverian kings endeavoured to counteract this influence by the use of their ecclesiastical patronage. They appointed learned latitudinarians—such men as Burnet, Tillotson, and Stillingfleet—to episcopal sees, so that the influence of the bishops was exerted on the side of the Revolution and revolution principles.[6] Thus seven out of twelve bishops voted for the condemnation of Sacheverell, and in 1703 and 1704 the majority of the bishops opposed the occasional conformity Act.[7] It followed, therefore, that, at the end of the seventeenth and the beginning of the eighteenth century, the bishops were disliked both by the lower ranks of the clergy and by the Tories. At the beginning of the eighteenth century there were bitter conflicts between the upper and lower Houses of Convocation;[8] and in *The Freeholder* the Tory fox hunter is represented as saying that the neighbouring shire was very happy

[1] Bl. Comm. i 279-280; vol. i 588-598; vol. iv 36, 45. 47.
[2] Vol. vi 202-203. [3] Ibid 279. [4] Above 38-39, 51.
[5] Lecky, History of England i 92. [6] Ibid 104-105.
[7] Ibid 106. [8] Ibid 112.

in having "scarce a Presbyterian in it—except the bishop." [1] But the Crown's refusal to allow Convocation to meet for the purpose of transacting business after 1717 [2] eliminated an opportunity for sectarian controversy; and the steady pursuance of the policy of appointing latitudinarian bishops had its effect. Moreover, the influence of the new study of natural science began to be felt, and created "a *milieu* in which the Laudian tradition withered and died of inanition." [3] The best illustration of this fact is, as Lecky points out, the failure of the attempt to rouse national feeling against Atterbury's arrest for high treason—"so rapidly had the ecclesiastical sentiment throughout England declined that the Whig ministry of George I was able, without serious difficulty, to deprive of his dignities and to banish from the country the most brilliant and popular bishop in the English Church." [4]

The success of this policy was largely due to the fact that it was seconded by the manner in which the Crown, the bishops, the cathedral chapters, and many of the great landowners, used their very considerable ecclesiastical patronage.[5] The prerogative of the Crown, and the ecclesiastical patronage of the Crown, the bishops, the cathedral chapters, and the great landowners, were so used that the administration of the church was assimilated to that of the state. In both church and state the peers and the landed gentry, partly by means of their own patronage, and partly by the manner in which the Crown used its prerogatives and patronage to reward its adherents, got the control.[6] In both the evils of patronage were rampant.[7] Sinecures, pluralism, and non-residence flourished; [8] and the curates

[1] The Freeholder no. 22, cited Lecky, History of England i 111.

[2] Hallam, C.H. iii 247; Anson, The Crown (4th ed.) ii Pt. ii 259; Walpole allowed it to sit in 1741, "till a revival of the contumacy of the lower house towards the upper compelled its prorogation," N. Sykes, The Church and State in the Eighteenth Century 2.

[3] Ibid 23. [4] History of England i 314-315.

[5] Out of 11,700 benefices some 5,700 belonged to the landed gentry, and of the rest many belonged to the Crown, the cathedral chapters, the colleges of Oxford and Cambridge, and the bishops, Halévy, History of the English People in 1815 345; "even when the appointment lay with the Crown, the government often found it difficult to resist the pretensions of the gentry. The landowner of the parish whose vicar was to be appointed demanded that the Crown should give effect to his choice," ibid; cp. N. Sykes, The Church and State in the Eighteenth Century 36, 50-51.

[6] Dr. Johnson said, "no man can now be made a bishop from his learning and piety, his only chance for promotion is his being connected with somebody who has Parliamentary interest," Boswell, Life of Johnson April 14 1775, cited N. Sykes, op. cit. 41; for the influence of the nobility in appointments to bishoprics and other dignities see ibid 89-90, 157 seqq.

[7] Halévy, History of the English People in 1815 345-346.

[8] "One incumbent could hold simultaneously two, three, four, or even more benefices. There is an instance of a single ecclesiastic in possession of eight. . . . The rector or vicar (for the vicar of one parish could be rector of another and vice versa, and either, indeed might even be a bishop or archbishop) appointed a curate at a low stipend, and took the rest of the income for himself. From the parishes

who were supposed to do the work were miserably paid.[1] The conditions which prevailed in the offices of the courts [2] and the departments of the executive government [3] were reproduced. Cobbett discovered a Wiltshire parish which was "an ecclesiastical Old Sarum." It was worth £300 a year, but it had neither church nor parsonage. "Whenever a new parson was to be inducted, a tent was erected on the site where the parish church had once stood, and in that tent the ceremony of induction was performed." [4] Just as vested interests helped to prevent any attempt to adjust the distribution of seats in the House of Commons to a changed distribution of population,[5] so these same interests prevented any serious attempt to alter the distribution of sees, or to build churches to meet the needs of a growing population in London, or of the new populations of the growing industrial centres of the Midlands and the North.[6]

The noble patrons of the existing churches had no desire for a new church which by its competition with the other livings would reduce their market value. The Duke of Portland compelled the parish of Marylebone, with a population of 40,000, to be content with a village church with accommodation at the utmost for 200.[7]

The result of this policy on the religious life of the church was bad. All religious enthusiasm was killed. The clergy preached

a literal and rationalistic Christianity, a system of humanitarian ethics in which the supernatural was left out of sight. The goal of this direction of Anglican opinion was the book published by Paley in 1785 in which he identified Christian with utilitarian ethics, and presented Jesus Christ as the first teacher of the greatest happiness principle.[8]

It is not surprising that no place was found in the church for John Wesley, and the very real and emotional Christianity which he preached. But the political results of "the religious languor" which fell over England were good. It tended to banish from politics the *odium theologicum*, and it tended to promote the

of Wetherdale and Warwick the Dean and Chapter of the see received tithe to the value of £1,000 per annum, and an equal sum in rents. They paid a curate £50," Halévy, op. cit. 348; cp. N. Sykes, op. cit. 183, 184-186.

[1] "Forty pounds a year is reckoned very good pay for a curate and, notwithstanding this Act of Parliament (12 Anne c. 12), there are many curacies under twenty pounds a year," Adam Smith, Wealth of Nations (Cannan's ed.) i 132; the Act referred to allowed bishops to appoint a stipend of not more than £50 and not less than £20 a year.

[2] Vol. i 256-259, 441. [3] Below 501-503.

[4] Halévy, op. cit. 349, citing Cobbett, Rural Rides Sept. 29 1826.

[5] Below 563-564.

[6] Halévy, op. cit. 349-350; the fifty new churches for London provided for by 9 Anne c. 22 were not erected—"during the entire course of the century, despite the unexpected increase of the population, only ten churches were erected in the capital," ibid 350.

[7] Ibid. [8] Ibid 344.

growth of toleration.[1] The outbursts of popular fanaticism—the outburst which compelled the government in 1754 to repeal the Act for the naturalization of the Jews which it had passed in 1753,[2] and the Gordon riots in 1780 which followed upon the grant of a very moderate measure of relief to the Roman Catholics[3]—are events which show that the weakening of the *odium theologicum* and the growth of toleration were with difficulty attained. It cannot, I think, be doubted that the fact that these tendencies were growing in strength throughout the eighteenth century, was largely due to the way in which the Crown, all through that century, used its ecclesiastical prerogatives, and to the way in which the Crown, the bishops, the cathedral chapters and the landowners used their ecclesiastical patronage. The close union between church and state which was thus secured helped to give popularity and stability both to the church and the government; for neither party showed any hostility to the church; so that theological differences were removed from the political arena.[4] M. Halévy truly says:[5]

> The nation was tolerant of a clergy, apathetic indeed and worldly, but little disposed to play the tyrant. Statesmen of both parties were agreed in their appreciation of a system under which the priests did not constitute an order marked off from the rest of the nation, but were men of their own class, their relatives and friends, intimately bound up with the life of county society. Even a democrat like Cobbett, an avowed enemy alike of the Crown and the aristocracy, and a violent opponent of the Methodists, had not yet in 1815 declared war on the parish clergy.[6]

It was recognized that the clergy exercised a healthy and a civilizing influence—Dr. Johnson reaffirmed the dictum of Dean Percy of Carlisle "that it might be discerned whether or no

[1] "In spite of occasional outbursts of popular fanaticism, a religious languor fell over England, as it had fallen over the continent; and if it produced much neglect of duty amongst clergymen, and much laxity of morals among laymen, it at least in some degree assuaged the bitterness of sectarian animosity and prepared the way for the future triumph of religious liberty," Lecky, History of England i 363; and this was the view taken by Adam Smith in the very impartial paragraph which he wrote on this subject, Wealth of Nations (Cannan's ed.) ii 292-293.

[2] Above 82.

[3] Above 114.

[4] "The Tories rejoiced indeed in the name of 'the Church party'; but their Whig supplanters from 1714 to 1760 were sufficiently wise in their generation as children of this world to support the external lineaments of the Church establishment and the restrictive test law. During their administration the cry of 'the Church in danger,' when sporadically raised, was ineffective because untrue," N. Sykes, The Church and State in the Eighteenth Century 90.

[5] Op. cit. 351-352.

[6] We have seen, above 145; that the clergy helped the landowners to govern their counties, and were sometimes some of the most industrious and learned of the justices of the peace; similarly the bishops and other church dignitaries were expected to use their influence to help ministers to return their candidates at Parliamentary elections, N. Sykes, The Church and State in the Eighteenth Century 78-84.

there was a clergyman resident in a parish by the civil or savage manner of the people"; [1] and the charge that the bishops were as a class neglectful of their duties is not true.[2] It was partly the result of this absence of any hostility to a church which was literally a part of the admired British constitution, and partly the result of the Methodist revival, that, at the end of the century, there was in England no such anti-Christian agitation as in France preceded and accompanied the French Revolution.[3]

This summary of Blackstone's account of the prerogative shows that it had attained its modern position in the constitution. I must now deal with the machinery, by means of which the powers vested in the King by virtue of his prerogative, or the additional powers conferred on him or on departments of the central government by statute, were put into motion. An account of this machinery naturally falls into two parts—the King himself and his royal family, and his councils, ministers, and the departments of state. I shall deal with these matters in the two following sections.

The King and his Royal Family

In spite of the efforts of the Tudor and Stuart lawyers to give the King a corporate capacity, and, in that capacity, to endow him with the superhuman qualities of immortality and impeccability,[4] the stubborn fact remained that he was a mortal man, subject to the same abilities and disabilities as other mortal men. This fact has given rise to a body of law relating to the King and his royal family, which is concerned with those natural incidents which may or must occur in the lives of all human beings. This body of law has older roots than any other part of the law relating to the prerogative. It has been affected by the conception of kingship prevailing amongst the Anglo-Saxon tribes, to which the church added a new sanctity and a dignity; [5] by the mediæval conception of the King as a natural man, not essentially different from other feudal lords; [6] by the Tudor conception of the King as a corporation sole; [7] by Stuart theories of divine right; [8] and by the Parliamentary limitations upon the King's prerogative, which repudiated a divine right, denied that the prerogative was the sovereign power in the state, and asserted its subjection to the law.[9] The contents of this body of law can be grouped under the following three heads:

[1] N. Sykes, The Church and State in the Eighteenth Century 272.
[2] Ibid 412-413.
[3] Above 11 nn. 3 and 4, 12 n. 7; N. Sykes, op. cit. 420-421.
[4] Vol. iv 202-204; vol. vi 11-12, 276-277. [5] Vol. ii 8, 23.
[6] Vol. iii 463-469. [7] Vol. iv 202-204.
[8] Vol. vi 276-280. [9] Ibid 282.

first, the descent of the Crown; secondly, provisions for the minority, the mental incapacity, and the absence of the King; and thirdly, the exceptional status of certain members of the royal family.

(1) *The descent of the Crown.*

It would, I think, be safe to say that the law as to the descent of the Crown, as to the accession of the King, and as to the solemnities of his coronation, bears traces of legal and religious ideas which come from all periods in the history of the law—from the time of the Anglo-Saxons down to the eighteenth century. The main principle underlying these rules is derived from and is based upon the feudal identification of property and government.[1] The kingdom descends like a freehold estate in the land—subject to variations in some of the rules of descent, owing to the fact that a kingdom cannot be treated quite like an ordinary estate.[2] But other principles derived from other ideas have also made their influence felt. From the days of the Anglo-Saxons, theological ideas tended to give the King a position different from that of other rulers. They added to the sanctity and dignity of the royal office.[3] And this influence easily combined with the rule that the kingship was hereditary, to create, in the seventeenth century, the theory of the divine right of kings.[4] On the other hand, these same theological ideas emphasized the obligations of the King to his subjects—obligations to execute justice and to maintain the moral rules and truths taught by the Christian religion.[5] This influence easily combined with the early Germanic idea that the kingship was, within limits, elective, and that therefore an unworthy King could be deposed by the body which had elected him;[6] and with the mediæval idea that the law both of God and of the state was supreme over King and subject alike.[7] These ideas tended to disappear in continental countries, when the King succeeded in making himself an absolute ruler and the embodiment of the state.[8] They were kept alive in England by the action of the mediæval Parliaments, which preserved the idea of the supremacy of the law,[9] and the right to depose an unworthy King.[10] It was with the help of the mediæval idea of the supremacy of the law that the battle for constitutional government was won in the seventeenth century; and the mediæval precedents for the deposition of an unworthy King were followed in 1688,

[1] Vol. i 17.
[2] Below 427.
[3] Below 428.
[4] Below 428.
[5] Below 430.
[6] Below 430-431.
[7] Vol. ii 121-122.
[8] Vol. iv 196.
[9] Vol. ii 435-436, 441 442; vol. iv 187-189.
[10] Below 430-431.

when James II was in effect deposed.[1] The elective element in the title to the throne was thus preserved and strengthened by the Revolution and the Act of Settlement.[2] It was combined with the hereditary element; and Blackstone accurately describes the result in the following formula: "the crown is, by common law and constitutional custom, hereditary; and this in a manner peculiar to itself: but the right of inheritance may from time to time be changed or limited by Act of Parliament; under which limitations the crown still continues hereditary." [3]

I shall deal with (i) the hereditary principle and its variations; (ii) the theological influences; and (iii) the elective principle and its development by Parliament. Lastly, I must say a few words as to the effects of a demise of the Crown.

(i) *The hereditary principle and its variations.*

"As to the particular mode of inheritance," says Blackstone,[4] "it in general corresponds with the feudal path of descents, chalked out by the common law in the succession to landed estates." [5] Thus the Crown descends to the issue of the King; and the preference of males to females and the rule of primogeniture are adhered to. The rule of representation, the rule, that is, that the son of a deceased ancestor represents his father, is also observed. The fact that John succeeded in defiance of the rule of representation, for some time exercised a disturbing influence on the rules of inheritance [6]—so closely were the rules as to the descent of an estate in the land bound up with the rules as to the descent of the Crown. But some of the rules of inheritance are not observed; for, "concerning descents there is a law, parcell of the lawes of England, called *jus coronae*," which "differeth in many things from the generall law concerning the subject." [7] Thus the doctrine of *possessio fratris* is not applicable—Mary and Elizabeth succeeded to Edward VI. The eldest daughter inherits to the exclusion of her sisters.[8] "If the right heire of the crowne be attainted of treason, yet shall the crowne descend to him, and *eo instante* (without any other reversall) the attainder is utterly avoided as it fell out in the case of Henry the seventh." [9] There is no need for a formal act, such as coronation, to give the King seisin of his kingship. We have seen that, even in the Middle Ages, the coronation of the King

[1] Vol. vi 230-231. [2] Below 431. [3] Comm. i 191.
[4] Ibid 193. [5] For the history of these rules see vol. iii 171-185.
[6] Vol. iii 175. [7] Co. Litt. 15b.
[8] "The reason of all these cases is, for that the qualitie of the person doth in these and many other like cases alter the descent, so as all the lands and possessions whereof the king is seised in *jure coronae*, shall *secundum jus coronae* attend upon and follow the crown," ibid.
[9] Ibid 16a.

was not regarded as a part of his title or a condition precedent to his recognition as King,[1] but only "a royal ornament and solemnization of the royal descent."[2]

The leading principles of the common law were developed in the Middle Ages under feudal conditions and in a feudal atmosphere. It is not therefore surprising to find that the main principle, which regulates the succession to the Crown, is the same principle as that which regulated the succession to an estate of freehold—with only such variations as were needed to adapt these rules to the peculiar case of the Crown.

(ii) *The theological influences.*

We have seen that these influences began to differentiate the King from other rulers as early as the Anglo-Saxon period,[3] and that they made for the stability of the nascent state. The renaissance of Roman law in the twelfth and thirteenth centuries [4] emphasized them ; [5] and the Reformation considerably increased them. The superior divinity which Pope and Emperor had asserted in the Middle Ages was then transferred to the King.[6] James I combined the theory that the King was King by a divine right with the rule that the kingship was hereditary, and thus created the theory of a divine hereditary right.[7] The nature of his title to the throne,[8] and the fact that he had succeeded in defiance of the settlement which Henry VIII had made by virtue of the powers conferred upon him by statute,[9] lent plausibility to this theory. If it had prevailed little more could have been heard of the other side of the teaching of the church—the duty of the King to obey the law of God and of the state. It would have become, as in continental states, a duty of very imperfect obligation. Still less would have been heard of the elective principle and of the right of Parliament to depose an unworthy King. The King would have become absolute, and his prerogative the sovereign power in the state. The failure of the Stuarts to accomplish this result entailed the condemnation of their theory of divine hereditary right. It rendered effective the duty of the King to obey the law by subjecting his prerogative to the law ; it brought into prominence the elective element in the kingship by giving Parliament the opportunity to settle the succession to the throne ; and it thus made the heredi-

[1] Vol. iii 464.
[2] Calvin's Case (1608) 7 Co. Rep. at f. 10*b*.
[3] Vol. ii 23.
[4] Ibid 145-146, 202-203, 269-270.
[5] Ibid 253-254 ; cp. vol. i 87.
[6] Vol. iv 18-19.
[7] Vol. vi 11-12, 276-277.
[8] As Blackstone points out, Comm. i 208, James I was the representative of the Saxon line of Kings, as well as of the Norman line.
[9] 35 Henry VIII c. 1 ; Anson, The Crown Pt. i 229.

tary principle subject to the power of Parliament to vary that principle.[1]

After the two breaks in the hereditary principle created by the Revolution and the Act of Settlement, the theological influence came to be confined mainly to the ritual observed at the King's coronation [2]—the celebration of the communion, the recital of the litany, and the delivery of a sermon; the anointing with consecrated oil; the presentation of the orb with a cross; the investiture with the ring and two sceptres; the coronation by the archbishop of Canterbury; the presentation of a Bible; the saying of the benediction and Te Deum; and the enthronization. All these ceremonies represent the theological influences which, from the days of the Anglo-Saxons, have helped to give a supernatural dignity to the royal office. They are survivals of ideas which in past time have had a powerful influence on law and politics—just as many of the honorary services which many persons claim by virtue of hereditary right to perform at a coronation, are survivals of the pageantry of a feudal court, and of those feudal serjeanties, which supplied the mediæval King and his court with many services, both military and domestic, of a more or less personal kind.[3]

(iii) *The elective principle and its development by Parliament.*

Election by the Witan, normally within the sphere of the royal family, was the rule in Anglo-Saxon days; [4] and we can see a survival of these ideas in that part of the coronation ceremony in which the King is presented by the Archbishop of Canterbury the Lord Chancellor and other high officials to the people, and is recognized by the people as King.[5] We have seen that the influence of the feudal identification of property and government made for the extension and precise definition of the hereditary principle. The rules developed for the descent of a freehold estate in land were, with some modifications, applied to the descent of the Crown.[6] But just as theological influences tended to put the King into a position different from that of other rulers by giving him an added sanctity,[7] so these same influences tended to emphasize the fact that what the King inherited was something very different from an estate in the

[1] Above 426; below 431-432.

[2] For this ritual see Halsbury, Laws of England (2nd ed.) vi 400-401.

[3] For these services see ibid 404-413; for tenure by serjeanty see vol. iii 46-51.

[4] Stubbs, C.H. i 158-161; Anson, The Crown Pt. i 225.

[5] Halsbury, Laws of England (2nd ed.) vi 399-400 and n. (*p*); Anson, The Crown (4th ed.) ii Pt. i 270 n. 3, tells us that the people for this purpose are represented by the boys of Westminster school, "who rehearse beforehand the part played by the crowd at a medieval coronation."

[6] Above 427.

[7] Above 428.

land. The Church had always insisted that the King, like other rulers, owes duties to his people ; [1] and those duties were plainly set out in the oath which, from the earliest times, the King has taken at his coronation.[2] As Anson says : [3]

> The Coronation Oath indicates the contractual character of English Sovereignty, a character which was common as well to the official chief of Saxon times as to the territorial lord of feudalism. The form survived the high prerogative days of Tudors and Stuarts and the theory of Divine Right. The wording of the oath was settled immediately after the Revolution. Its substance—to keep the Church and all Christian people in peace—to restrain rapine and wrong—to temper justice with mercy—is as old as the eighth century.

In most continental countries the Crown, in the course of the sixteenth and seventeenth centuries, made itself absolute and the embodiment of the state ; and its duties came to be regarded as merely moral or religious duties, which were unenforceable by the law of the state.[4] In England the course of development was very different. Though, on the one hand, the influence of the proprietary element in feudalism and the elaboration of the rules of the law of real property, gave precision to hereditary principle ; [5] on the other hand, the rise of Parliament in the fourteenth and fifteenth centuries, and the control which it kept over the actions of the Crown, gave a new meaning and a new precision to the idea that the Crown was subject to the law, and that the King owed duties to his subjects. It made his subjection to the law and his obligations to his subjects very real things. In the Saxon period there are several instances in which kings were deposed.[6] The strength of the Norman and Angevin kings, and the growth of the hereditary principle, tended to make both the elective principle and the right of the nation to depose an unworthy King, fall into the background. But the rise of Parliament revived both the elective principle and the right of deposition in another form. Edward II and Richard II were deposed.[7] After the deposition of Richard II Parliament recognized Henry IV as King,[8] thus departing from the strict rule of hereditary succession ; and it subsequently made a settlement of the Crown on Henry IV and his four sons.[9] Parliament reverted to the strict hereditary rule when it recognized Edward IV as King in 1461,[10] and it resettled the Crown when Henry VII prevailed over the Yorkists at the battle of Bosworth in 1485.[11] No doubt the immediate occasion for these Parliamentary resettlements was the fortune of war. But the fact that Parliament was called upon to legalize the results of the fortune of

[1] Vol. ii 7, 23. [2] Anson, The Crown ii Pt. i 270-271. [3] Ibid 272.
[4] Above 6. [5] Above 427. [6] Stubbs, C.H. i 161-165.
[7] Ibid ii 392-395, 548-555. [8] R.P. iii 423, no. 54.
[9] 7 Henry IV c. 2. [10] R.P. v 463 no. 8. [11] R.P. vi 270.

war emphasized in a new form the elective character of the monarchy.

The power of the Crown was re-established by the Tudors. They made the Crown the predominant partner in the constitution. But the fact that Henry VIII thought it necessary to get Parliamentary sanction for his various settlements of the Crown,[1] kept alive the power of Parliament, and, with it, the elective principle. Acts of Parliament recognized the hereditary right of Mary [2] and Elizabeth ; [3] and in 1571 it was declared that Acts of Parliament were able to limit the descent of the Crown.[4] When James I succeeded to the throne, in defiance of the settlement which Henry VIII had made by virtue of the statutory powers conferred upon him, Parliament was called upon to recognize and acknowledge his right.[5] The exclusion controversy in Charles II's reign [6] proved, as Blackstone points out,[7] two things—first that the Crown was hereditary, and " the inheritance indefeasible unless by Parliament ; " and, secondly, " that the Parliament had a power to have defeated the inheritance." Both these points were made abundantly clear by the Bill of Rights [8] and the Act of Settlement.[9] Parliament, in both cases, made resettlements of the Crown ; and in both cases these departed from the strict line of hereditary succession, in so far as it appeared to it to be necessary to safeguard the constitution as established by the Revolution. But the schism of the non-jurors, and the existence of a considerable Jacobite party,[10] showed that the idea that the succession to the throne was a matter which could not be settled by Parliament, was so widespread, that it was necessary to legislate against it. The Act of 1707,[11] like the Act of 1571,[12] made it a criminal offence to maintain that the King in Parliament could not make laws to bind the Crown and the descent thereof.

At the Revolution the Crown was settled on William and on Mary, the eldest daughter of James II, for their joint lives ; then on the survivor ; then on the issue of Mary ; on failure of her issue on Anne, James II's second daughter, and her issue ; and, lastly, on the issue of William III, who was the grandson of Charles I and nephew and son-in-law of James II.[13] Thus William, Mary, and Anne took, not by hereditary right, but by purchase.[14] The Act of Settlement settled the Crown on Sophia

[1] 25 Henry VIII c. 22 ; 28 Henry VIII c. 7 ; 35 Henry VIII c. 1.
[2] 1 Mary St. 2 c. 1. [3] 1 Elizabeth c. 3. [4] 13 Elizabeth c. 1 § 4.
[5] 1 James I c. 1 § 4. [6] Vol. vi 185-189. [7] Comm. i 210.
[8] 1 William and Mary St. 2 c. 2. [9] 12, 13 William III c. 2
[10] Above 38, 39, 51. [11] 6 Anne c. 7 § 1.
[12] 13 Elizabeth c. 1 § 4.
[13] 1 William and Mary St. 2 c. 2 § 2 ; Bl. Comm. i 216.
[14] Ibid 214-215.

of Brunswick, the grand-daughter of James I and her issue.[1] Both these resettlements of the Crown went further than previous Parliamentary settlements or resettlements. They both placed certain restrictions on the prerogative of the Crown, and also rendered incapable of succeeding to the throne a Roman Catholic and a person who married a Roman Catholic.[2] The Act of Settlement also provided that the King must make a declaration against transubstantiation, take the coronation oath in the form settled by the statute of 1689,[3] and join in communion with the Church of England.[4] The Acts of Union with Scotland [5] and Ireland [6] made the same provisions for the devolution of the Crown of Great Britain and Ireland ; and the Act of Union with Scotland provided that the King must take the oaths for the preservation of the Church of England and the Presbyterian Church in Scotland.[7] Hence, as Blackstone points out,[8]

> the title to the throne is at present hereditary, though not quite so absolutely hereditary as formerly ; and the common stock or ancestor, from whom the descent must be derived, is also different. Formerly the common stock was king Egbert ; then William the Conqueror ; afterwards in James I's time the two common stocks united, and so continued till the vacancy of the throne in 1688 ; now it is the princess Sophia. . . . Formerly the descent was absolute, and the crown went to the next heir without any restriction : but now, upon the new settlement, the inheritance is conditional ; being limited to such heirs only, of the body of princess Sophia, as are protestant members of the Church of England, and are married to no one but protestants.

In this mixture of the hereditary and elective principles Blackstone rightly saw one main reason for the permanence of the monarchy :[9]

> When the magistrate, upon every succession, is elected by the people, and may by the express provision of the laws be deposed (if not punished) by his subjects, this may sound like the perfection of liberty, and look well enough when delineated on paper ; but in practice will be ever productive of tumult, contention, and anarchy. And, on the other hand divine indefeasible hereditary right, when coupled with the doctrine of unlimited passive obedience, is surely of all constitutions the most thoroughly slavish and dreadful. But when such an hereditary right, as our laws have created and vested in the royal stock, is closely interwoven with those liberties, which are equally the inheritance of the subject ; this union will form a constitution, in theory the most beautiful of any, in practice the most approved, and, I trust, in duration the most permanent.

[1] 12, 13 William III c. 2 § 1.
[2] 1 William and Mary St. 2 c. 2 § 9 ; 12, 13 William III c. 2 § 2.
[3] 1 William and Mary St. 1 c. 6.
[4] 12, 13 William III c. 2 §§ 2 and 3.
[5] 5, 6 Anne c. 8 Art. 2.
[6] 39, 40 George III c. 67 Art. 2.
[7] 5, 6 Anne c. 8 Art. 25 §§ 4 and 8
[8] Comm. i 217.
[9] Ibid.

(iv) *The effects of the demise of the Crown.*

"The King," it was said in the case of *Hill v. Grange*,[1] "is a name of continuance, which shall always endure as the head and governor of the people (as the law presumes) as long as the people continue, *quia ubi non est gubernator, ibi dissipabitur populus* and in this name the King never dies. And therefore the death of him who is the King is in law called the demise of the King, and not the death of the King, because thereby he demises the kingdom to another, and lets another enjoy the function, so that the dignity always continues." If this idea had been logically followed out the demise of the King would have had no effect upon the machinery of government. The King's servants, his councils, and his acts, would have been regarded as the servants, the councils, and the acts of the Crown, which were unaffected by the accident of a change in the natural person who held the office. The King would really have been "a name of continuance." But we have seen that the force of the mediæval precedents, which refused to admit this conception of a corporate King, immortal and impeccable,[2] the theory of the lawyers that it was almost treasonable to draw too clear a line of separation between the natural and the corporate capacities of the King,[3] and the results of the constitutional developments of the seventeenth century,[4] all combined to prevent this idea from being followed out to its logical conclusion. The law still steadily stuck to the idea that the results which followed upon a demise of the Crown, were the same results as those which followed from the death of a natural man, who had delegated many of his powers to others. "At the delegator's death the delegation ceased. . . . We might have thought that the introduction of phrases which gave the King an immortal as well as a mortal body would have transformed this part of the law. But no."[5] We have seen that it was even thought that the maxim *actio personalis moritur cum persona* applied to prevent liabilities, which affected him from affecting his successor.[6]

[1] (1557) Plowden at p. 177; cp. Willion v. Berkley (1561) ibid at p. 234 where, after explaining that the King has two capacities, natural and politic, it is said that in his politic capacity the King never dies, "and his natural death is not called in our law the death of the king, but the demise of the king, not signifying by the word (*demise*) that the body politic of the king is dead, but that there is a separation of the two bodies, and that the body politic is transferred and conveyed over from the body natural now dead, or now removed from the dignity royal to another body natural. So that it signifies a removal of the body politic of the king of this realm from one body natural to another."

[2] Vol. iii 463-466. [3] Ibid 466-467; vol. ix 5-7. [4] Ibid.

[5] Maitland, Collected Papers iii 253; for the same reason, as Maitland points out, ibid 252, much legislation has been needed to make it clear that the King can own property which is his private property, and not the property of the state.

[6] Vol. ix 6.

As Maitland says, "the consequences of the old principle had to be picked off one after another by statute." [1] To the history of this statutory picking off we must now turn.

The first inroad was made in the sphere of litigation. The King's writs, because they were the King's commands, abated on his death, and pending legal proceedings were discontinued, so that all litigation must start afresh. This was remedied by a statute of 1547; [2] and, by a statute of 1692, it was provided that pleas to informations in the King's Bench were not to abate by reason of the demise of the Crown.[3]

Parliament was summoned by the King, and therefore it ceased to exist when he died. It was provided by a statute of 1696 [4] that Parliament was to continue to sit for six months after the demise of the King, unless it was sooner dissolved by his successor. If no Parliament was in existence when the King died, the last Parliament was to be revived. In 1797 provision was made *inter alia* for the contingency of the death of the new King within six months of the death of his predecessor, without his having dissolved the old Parliament. In that case the Parliament was to sit for a further period of six months.[5] It was not till 1867 that it was enacted that the duration of Parliament should not be affected by the demise of the Crown.[6]

The demise of the Crown dissolved the Privy Council, and put an end to the tenure of all the officers of state and all commissions in the army. In effect it left the country without an executive government and without an effective army. "The practical inconvenience and even danger to which the legal theory might give rise became evident in the reign of Anne. In all probability the successor to the Crown, designated by statute, would be in Hanover at the moment of the Queen's death. A rival claimant of the throne was no further off than St. Germains." [7] It was therefore provided in 1707 that the Privy Council, unless sooner dissolved by the new King, and the holders of all offices civil or military, unless sooner dismissed by the new King, should continue for six months after the demise of the Crown.[8] This statute perhaps applied to the judges; but whether or not it applied to them is a merely academic question, for we have seen that it was enacted in 1760 that the judges' tenure of office should not be affected by the demise of the Crown.[9] In 1830 the six months were extended

[1] Collected Papers iii 253.
[2] 1 Edward VI c. 7.
[3] 4 William and Mary c. 18 § 7.
[4] 7, 8 William III c. 15; after the Union with Scotland the same provision was made for the Parliament of Great Britain by 6 Anne c. 7 §§ 4-7.
[5] 37 George III c. 127.
[6] 30, 31 Victoria c. 102 § 51.
[7] Anson, The Crown (4th ed.) ii Pt. i 279.
[8] 6 Anne c. 7 § 8.
[9] 1 George III c. 23; vol. i 195; above 415 n. 10.

to eighteen in the case of those holding office in the colonies ;[1] and in 1837 it was enacted that commissions in the army and the marines were to continue in force, unless cancelled, notwithstanding a demise of the Crown.[2] It was not till 1901 that the Legislature made the same provision for office holders as it had made for the duration of Parliament in 1867, by enacting that "the holding of any office under the Crown, whether within or without His Majesty's dominions, shall not be affected, nor shall any fresh appointment thereto be rendered necessary, by the demise of the Crown."[3] It was owing to one of the effects of the Act of 1867 that it was necessary to make this enactment in 1901. But for the Act of 1901 all the cabinet ministers would, whilst Parliament was sitting, have vacated their seats six months after the beginning of the new reign, and, if reappointed, would have been obliged to seek re-election.[4]

This long series of statutes has thus at length effected what might have been effected automatically, if the idea that the King has a corporate capacity, and is a corporation sole, had been logically applied.

(2) *Provisions for the minority, the mental incapacity, and the absence of the King.*

Though the logical application of the idea that the King has a corporate capacity would have prevented the inconveniences which resulted from a demise of the Crown, it would not have obviated the necessity for making some provision for his minority, or mental incapacity, or absence. The provisions made by the law for the first two of these events, and, to a less extent, the provisions made for the third event, emphasize that elective principle in the descent of the Crown, which took permanent shape in the power of Parliament to regulate the succession to the throne. Before the rise of Parliament, the power to make provision for these events fell naturally to the Council, because it was the governing body of the kingdom.[5] After the rise of Parliament, Parliament asserted the right to make the necessary arrangements ;[6] but it never did more than provide for the particular emergency. In the sixteenth century, when the King was endowed with a corporate capacity which was subject to none of the defects of his natural capacity, and when the lawyers refused to separate the two capacities, and attributed all the superhuman qualities of the corporation sole, which they had created, to the natural King,[7] it would have been regarded as

[1] 1 William IV c. 4 § 2.
[2] 7 William IV and 1 Victoria c. 31.
[3] 1 Edward VII c. 5.
[4] Anson, The Crown (4th ed.) ii Pt. i 279-281.
[5] Below 436.
[6] Below 436.
[7] Vol. ix 4-5 ; Co. Lit. 43b ; above 433.

illogical, and perhaps indecent, to contemplate the necessity for making general provisions for such events as the minority or the insanity of the King. In this respect the speculations of the lawyers coincided with the policy of Parliament. The result is that there is no law on these matters except that which Parliament has from time to time made on a particular emergency.[1] But the different laws, which Parliament has made from time to time, have been regarded as a series of precedents, to which Parliament will look for guidance in considering what course to take when a new emergency arises; and this fact supplies, as we shall now see, a certain element of continuity in the provisions which Parliament has from time to time made for these events.

Minority.

Henry III is the first case after the Conquest of the accession of a King who was a minor. The barons who adhered to Henry III appointed the earl of Pembroke to be *rector regis et regni;* and Peter des Roches, bishop of Winchester, and the papal legate, were associated with him as his chief councillors.[2] Edward III was a minor when his father was deposed; and his first Parliament appointed a standing Council of four bishops, four earls, and six barons.[3] Edward III's grandson, Richard II, was a boy of eleven when he succeeded to the throne. To provide for the government a Council of twelve was appointed by the King and the House of Lords.[4] On the accession of Henry VI at the age of eight months two leading principles relating to minorities were definitely asserted: first, the principle that Parliament alone can make provision for the government of the country during a minority; and, secondly, the principle that Parliament can settle the powers of the person or persons to whom that government is entrusted.[5] It would seem that Henry V had wished his elder brother, the duke of Bedford, to govern in France, and his younger brother, the duke of Gloucester, to govern in England.[6] But Parliament resolved that the next-of-kin of the late King had, as such, no right to act as Regent, and that the King could not, without the consent of Parliament, dispose of the kingdom by his will. It proceeded to make the duke of Bedford Protector of the kingdom, and, in his absence, the duke of Gloucester; to nominate a Council; and to define

[1] "It has also been usually thought prudent, when the heir-apparent has been very young, to appoint a protector, guardian, or regent, for a limited time: but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority; and therefore he hath no legal guardian," Bl. Comm. i 248.

[2] Stubbs, C.H. ii 21-22. [3] Ibid 401. [4] Ibid 479-481.
[5] Ibid iii 104-105. [6] Ibid 102.

the powers of the Protector and Council.[1] The duke of Gloucester chafed at the control of the Council; [2] and a few years later, when he demanded a definition of his powers as Protector, it was found necessary to remind him of the limitations on his powers.[3] On the accession of Edward V this precedent was unfortunately not followed. Richard of Gloucester got control of the Council, induced it to make him Protector, and then, by a *coup d'état*, got an irregular assembly of lords and commons to offer him the Crown.[4] That offer was based on the theory that Edward IV had never been married to Elizabeth Woodville, and that therefore his children were illegitimate. Richard was crowned King and his nephews disappeared.[5] Edward VI was the next King to succeed as a minor; and for his minority Henry VIII had made provision by virtue of the powers conferred on him by Parliament.[6] By his will Henry VIII appointed sixteen executors to govern the King and kingdom till the King came of age. These executors elected the earl of Somerset Protector—an arrangement to which the House of Lords assented, though it was contrary to Henry VIII's will.[7]

There have been no other cases of Kings succeeding as minors. But on several occasions Acts have been passed to provide for particular contingencies of this kind.

In 1554 Philip was entrusted with the guardianship of the expected issue of the marriage between him and Mary till the child, if a male, reached the age of eighteen, or, if a female, reached the age of fifteen.[8] An Act passed in 1707 [9] to provide for the contingency of the absence of Anne's successor, formed, to a large extent, the model on which the next Act (passed in 1751) to provide for a minority was drafted.[10] That Act was passed to provide for the contingency of the descent of the Crown to any of the children of the late Prince of Wales while they were under the age of eighteen. The Princess of Wales was made the guardian of the persons of her children and Regent.[11] As Regent she was given power to exercise the prerogative.[12] To assist her a Council of Regency was named in the Act, together with four other persons to be named by the King.[13] Five of the members of this Council were to be a quorum.[14] For certain matters the consent of Council or any five was made

[1] Stubbs, C.H. iii 104-105. [2] Ibid 113. [3] Ibid 114-115.
[4] Ibid 238-241. [5] Ibid 241.
[6] 28 Henry VIII c. 7; 35 Henry VIII c. 1.
[7] Anson, The Crown (4th ed.) ii Pt. i 275; cp. Burnet, Hist. of the Reformation (Pocock's ed.) ii 38-40; at p. 60 Burnet points out that this action was contrary to Henry VIII's will, but that it might be justified by the fact that it was the act of the majority of the executors to whom the government had been entrusted.
[8] 1 and 2 Phillip and Mary c. 10 §§ 5 and 6. [9] 6 Anne c. 7.
[10] 24 George II c. 24. [11] § 1. [12] § 2. [13] § 3. [14] § 7.

necessary : [1] for other matters the consent of a majority of the whole Council was made necessary.[2] Even with the consent of the Council she could not assent to an Act which changed the order of succession, or Charles II's Act of Uniformity, or the Scotch Act of 1706 for securing the Presbyterian church government.[3] If a Parliament was in being when the Crown descended to a minor, it was to continue to sit for three years, or till the King attained the age of eighteen, or till dissolved by the Regent and Council : if it was not in being the last Parliament was to be revived for the same periods.[4] Anything done by order of the Regent or Council contrary to the provisions of the Act was to be void.[5]

In 1765, on the suggestion of the King, an Act was passed to give him power to appoint a Regent, in the event of any of his children succeeding to the throne under the age of eighteen.[6] The King wished to have power to nominate anyone he pleased to be Regent, but the ministry prevailed on him to limit his power of nomination to members of the royal family. This limitation raised debates as to whether the Queen was eligible, since she was not a natural born subject—to which problem the judges gave the obvious reply that she had become a subject as the result of her marriage. Then the question was raised whether the Princess dowager of Wales, the King's mother, was a member of the royal family. The ministers got the King's consent to leave her name out of the bill when it was introduced into the House of Lords, by the wholly false representation that, if it were put in, the House of Commons would strike it out ; and they refused to allow the King to retract, and to insert her name. After all it was inserted by the House of Commons.[7] It is not surprising that, after this episode, the King treated his ministers " with every mark of estrangement and aversion." [8] As the result of all this intrigue and debate the Act provided that the Regent to be nominated by the King must be either the Queen, the Princess dowager of Wales, or a member of the royal family descended from George II and usually resident in Great Britain.[9] It then went on to make provisions similar to those contained in the Act of 1751 for the powers of the Regent, for a Council of Regency, and for the powers of the Council. In 1830 it was provided that, in the event of Victoria succeeding to the throne while still under age, her mother the duchess of Kent should be Regent ; [10] and in 1840 it was provided that, in

[1] § 13. [2] § 14. [3] § 14. [4] § 18.
[5] § 22. [6] 5 George III c. 27.
[7] Walpole, Memoirs of the Reign of George III ii 107-154 ; Erskine May, Constitutional History i 169-175.
[8] Walpole, op. cit. ii 154. [9] 5 George III c. 27 § 2.
[10] 1 William IV c. 2.

the event of any of Victoria's children succeeding to the throne while still under age, Prince Albert should be Regent.[1] In neither of these cases was the Regent controlled by a Council of Regency. The control of the responsible ministers of the Crown was rightly considered to be sufficient.[2] The only one of the restrictions on the Regent's powers, contained in the former Acts, which was retained, was the incapacity to assent to any bill for altering the succession to the throne, the uniformity of worship in the Church of England, or the rights of the Church of Scotland.[3]

Insanity.

The first time that it was necessary to make provision for the insanity of the King was in 1454, when Henry VI became insane. The House of Lords appointed the duke of York Protector, and the appointment was confirmed by an Act of Parliament.[4] The King recovered some months later;[5] but, in the following year, he again became insane.[6] The Commons asked the Lords to appoint a Protector, and they again nominated the duke of York.[7] The King was considered to be sufficiently competent to give his assent to this nomination; and he formally appointed the duke Protector till he should be superseded by the King in Parliament, or till the prince came of age.[8] The government was to be in the hands of the Council of which the duke was to be the chief member.[9]

It was not till 1788 that occasion again arose to make provision for the insanity of the King. In 1788 the development of the principles of constitutional law, the technicality of Parliamentary procedure, and the exigencies of party politics, combined to render the precedents of 1454 and 1455 of very little use. These three causes produced the extraordinary measures taken to provide for this emergency in 1788, in 1801, and in 1810.[10]

In the autumn of 1788 Parliament had been prorogued till November 20. Before November 20 the King had become completely mad. Parliament met on the appointed day, since no authority could be got for a further prorogation. It adjourned for a fortnight and then met again; but, as it could not be opened by a speech from the throne, it had no legal authority to proceed to do any business. Committees of the two Houses were appointed to hear evidence as to the King's condition. After

[1] 3, 4 Victoria c. 52.
[2] Erskine May, Constitutional History i 221-222, 224.
[3] 1 William IV c. 2 § 10; 3, 4 Victoria c. 52 § 5.
[4] Stubbs, C.H. iii 179-180. [5] Ibid 183. [6] Ibid 186.
[7] Ibid 187. [8] Ibid. [9] Ibid.
[10] Erskine May, Constitutional History i 175-215; Lecky, History of England v 379-452.

hearing this evidence, Pitt moved that a committee be appointed to search for precedents.[1] On this motion Fox committed one of the worst of his many indiscretions, by maintaining that the Prince of Wales had as clear a right to be appointed Regent upon the incapacity of the King, as he had to the throne upon the death of the King.[2] Pitt maintained the undoubtedly correct view that the Prince had no such right, and that it was for Parliament to make provisions for such an event.[3] It is clearly the correct view; for it is difficult to see how any valid distinction can be drawn between the case of infancy and the case of insanity;[4] and in the case of infancy the right of Parliament to supply the defective capacity of the King is clear.[5]

Fox's claim of right was meant to shorten the proceedings by cutting out the search for precedents, which was, in his view, unnecessary.[6] But the smallest reflection should have shown him that such a claim was likely to lengthen rather than shorten the proceedings. It was certain to be contested, so that a long discussion upon a question of principle must intervene before any settlement could be made. It was therefore a move which was contrary to the interest of his party, which had reason to think that the Prince, as soon as he became Regent, would dismiss Pitt and bring Fox in. Seeing his error, Fox withdrew this claim of right; but, for sufficiently obvious reasons, he now maintained, first, that the Prince had the strongest claim to be made Regent—a proposition which no one disputed—and, secondly, that when appointed, no restriction ought to be placed on his powers.[7] Pitt, on the other hand, maintained that he ought not to have any powers not essential to the carrying on of the government, because the possession and exercise of those powers by the Prince might embarrass the King on his recovery.[8] Moreover,

[1] These precedents are set out in the Commons' Journals xliv 40.

[2] "In his firm opinion, his royal highness the Prince of Wales had as clear, as express a right to assume the reins of government, and exercise the power of sovereignty, during the continuance of the illness and incapacity with which it had pleased God to afflict his Majesty, as in the case of his Majesty's having undergone a natural and perfect demise. . . . The two Houses of Parliament, as the organs of the nation, were alone qualified to pronounce when the Prince ought to take possession of, and exercise, his right," Parlt. Hist xxvii 706-707.

[3] Unless by the decision of the two Houses of Parliament, "the Prince of Wales had no more right (speaking of strict right) to assume the government, than any other individual subject of the country," ibid 709.

[4] Maitland, Constitutional History 345-346; cp. Camden's speech, Parlt. Hist. xxvii 861, and Thurlow's speech, ibid 886.

[5] Above 436.

[6] He said, "the exigency was so pressing in point of time that he for one would willingly dispense with the motion then made [i.e. to search for precedents]. If the motion were carried, it must be considered that it was loss of time," Parlt. Hist. xxvii 706.

[7] Ibid 711, 722-723, 729-730.

[8] "Whatever authority was necessary for carrying on the public business with vigour and dispatch, and for providing, during this interval, for the safety and

since the question of right had been raised, he insisted that it should be settled. He therefore carried three resolutions: [1] First, that the exercise of the royal authority was interrupted; secondly, that the two Houses had the right to supply this defect in the royal authority; and, thirdly, that it was necessary to determine how the royal assent should be given to bills respecting the exercise of the powers of the Crown during the King's incapacity. With respect to the third resolution, Pitt explained that he intended to propose that the Chancellor should be empowered, by a vote of the two Houses, to set the great seal to a commission for the opening of Parliament, and to a commission for giving the royal assent to a Regency bill.[2] These resolutions were carried by both Houses; and in the House of Lords an amendment, which proposed that the more direct course (actually taken by the Irish Parliament) [3] of addressing the Prince to take upon himself as Regent the administration of the government, was defeated.[4]

In accordance with these resolutions a Regency bill was drawn up which made the Prince Regent, but subject to limitations upon his powers.[5] The care of the King's person and his household was entrusted to the Queen. The Regent was given power to exercise the prerogative, but subject to conditions and limitations. He could not dispose of any of the King's property, or grant any office in reversion, or any office or pension otherwise than during pleasure, except offices which were required by law to be granted for life or during good behaviour. He could not create any peerage except in favour of the King's issue who had attained the age of twenty-one. Parliament was then opened by virtue of a commission under the great seal as proposed by Pitt, and the Regency bill was introduced. It went through all its stages in the House of Commons; but, before it had gone through all its stages in the House of Lords, the King recovered. After the King's recovery, the legality of these proceedings was recognized by the issue of another commission, which empowered the commissioners "appointed by former letters patent to hold this Parliament, to open and declare certain further causes for holding the same." [6]

The complexity of the measures adopted on this occasion was mainly due, first, to the accidents of party politics; and, secondly,

interests of the country, ought to be given: but, on the other hand, any authority, not necessary for those purposes, and capable of being, by possibility, employed in any way which might tend to embarrass the exercise of the king's lawful authority, when he should be enabled to resume it into his own hands, ought to be withholden," Parlt. Hist. xxvii 727.

[1] Ibid 746-747.
[2] Ibid 784.
[3] Erskine May, Constitutional History i 194.
[4] Parlt. Hist. xxvii 859, 889.
[5] For the text of the bill see ibid 1258-1273.
[6] Ibid 1297.

to that worship of technicality which was a marked feature of all parts of English law, and more especially of the law as to the procedure, not only of the courts, but also of Parliament.[1] Let us analyse the working of these two causes.

(i) The appointment of the Prince of Wales as Regent would have meant the dismissal of Pitt, and the accession to office of Fox and the opposition. Fox mismanaged the situation as badly as he had mismanaged the policy of his party, when and after he had entered into his famous coalition with North.[2] By his claim of right for the Prince, and by his advocacy of unrestricted powers for the Prince, he enabled Pitt to win popularity as the asserter of the authority of Parliament, and as the protector of the rights of the King and the Queen in the event of his recovery.[3] The King was as popular as the Prince was unpopular. Fox's advocacy attracted this unpopularity to himself and his party, and revived the memory of the coalition, and its India bill, designed, as many thought, to give the coalition an ascendancy over the Crown.[4]

By a strange and unexampled fortune Pitt was able for the second time to constitute himself on the most popular grounds the champion of the Tory King, to appeal both to the special advocates of the royal prerogative and to the special advocates of the democratic elements in the constitution as the most faithful exponent of their respective principles. For the second time Fox, whose position depended wholly on the fidelity with which he advocated civil and religious liberty, was suspected by the nation of sacrificing the principles of the constitution to the interests of his party.[5]

(ii) The one precedent for the case of the King's insanity was so remote in date, the circumstances were so different, and the principles of constitutional law were then so rudimentary, that it afforded no guidance to the lawyers and statesmen of the eighteenth century. They were set the task of applying ascertained legal principles to a new situation; and, because it was an age in which technical correctness was considered to be all important,[6] their application of those principles must not infringe the technical rules of constitutional law or of Parliamentary procedure. The

[1] Sir Courtenay Ilbert has well said (Preface to Redlich, Procedure of the House of Commons i *xviii*) that "it was an age of technicalities. Special pleaders split hairs in judicial proceedings. Conveyancers span out their subtilties to inordinate length in legal chambers. Form was worshipped for its own sake, often to the detriment of substance. The same spirit showed itself in the proceedings in Parliament"; in fact this was an old characteristic of Parliamentary procedure, due largely to the influence of the lawyers, vol. ii 432-433; vol. xi 320-321.

[2] Above 110.

[3] Pitt pointed out, Parlt. Hist. xxvii 771-772, that "if persons who possessed these principles were in reality likely to be the advisers of the Prince," it was an additional reason why, in the interests of the King, his powers should be limited.

[4] Above 111.

[5] Lecky, History of England v 409.

[6] Above n. 1.

case of 1688 was easily distinguished. Then there was a vacancy of the throne : in 1788 there was not.[1] There was a King on the throne, but a King incapable of action by reason of mental incapacity. How was that capacity to be supplied without an infringement of established principles ? The answer was that it could not be so supplied ; and, for that reason, a direct address of the Houses of Parliament to the Prince, asking him to assume the regency, subject to conditions, would have been the easiest way out.[2] The complicated method suggested by the solicitor-general, Sir John Scott, the future Lord Eldon,[3] was supposed to provide a means of supplying the defective capacity of the King, without an infringement of established principles, for the following reasons :

It was clear that in law no distinction could be drawn between the natural and the politic capacity of the King; and that the King, in his politic capacity, was subject to none of the defects which afflicted his mortal body. If Henry VI, when an infant of nine months, could deliver the great seal to the master of the rolls, which could then be used to seal a number of commissions, including a commission empowering the duke of Gloucester to call a Parliament, why should not the great seal be used in a similar way when the King was insane ? A commission sealed with the great seal could not be disputed ; and if it was expressed to be affixed by an order of the King and the two Houses, no one could dispute it, or be called to account for so using it.[4] It operated as a sort of estoppel upon all branches of the government. To the objection that, by this manner of proceeding, Parliament could at

[1] As Pitt said, " At that time the two Houses had to provide for filling up a throne that was vacant by the abdication of James the 2nd ; at present they had to provide for the exercise of the royal authority, when his Majesty's political capacity was whole and entire, and the throne consequently full," Parlt. Hist. xxvii 732.

[2] See the speech of Lord North, ibid 751-752.

[3] Erskine May, Constitutional History i 192.

[4] See the speeches of the solicitor-general, Parlt. Hist. xxvii 825-828, 1155-1159 ; he said at p. 1156, " The only mode of obtaining the King's consent was by putting the Great Seal to the commission for passing it, and making it a public act. If it was so authorized, that rendered it a public act ; and if, upon the face of it, it expressed that it passed by the consent of the King, Lords, and Commons, the judges of the land could not dispute it. The Great Seal, once put to it, gave it all the authority of law, and no enquiry could be instituted as to the mode of its having been passed. If letters patent passed without the King's warrant having been previously granted, yet having the Great Seal annexed to them, however criminal it might be in the person who should take upon himself to put the Great Seal to those letters patent, they would prove of full force, and bind the King himself, although it might be known that his Majesty had not granted his warrant for making out such letters patent" ; Pitt said, ibid at p. 849, " certain forms of law were evidence of the will of the King, and wherever they appeared, could not be averred against. Of this nature was affixing the Great Seal" ; and then he went on to point out that, though the Chancellor would not dare to affix the seal by his own authority, he might well do so if authorized by " the great council of the nation" ; Camden agreed with this view, Parlt. Hist. xxvii 1125-1179.

any time eliminate the King, the answer was given that, since the use of this expedient was created by a particular necessity, it was limited by that necessity.[1]

The whole process depended partly upon the rule that in law no distinction could be drawn between the natural and the politic capacity of the King, and partly upon a presumption of law as to the binding force of a document sealed with the great seal—a presumption which operated, as estoppel often operates,[2] to prevent proof of the real facts. Both the rule and the presumption were well established; and they got over the great legal objection to the procedure by way of direct address to the Prince—the objection that it eliminated a King in being who, in his politic capacity, was capable of acting as King. Thus existing rules of law were made to supply an expedient for dealing with the incapacity of the King without an open break with the principles of constitutional law. Having regard to the fact that it was to the interest of the government to delay the settlement of the regency question; having regard to the unpopularity of the opposition by reason of their past record and their present conduct; and having regard to the feeling of very many lawyers and statesmen that the technical forms and rules of the constitution must at all costs be maintained—it is not surprising that a complicated expedient, very alien to our modern modes of legal and political thought, was then adopted.

After his recovery the King wished that some provision should be made for the occurrence of a similar emergency.[3] But nothing was done. In 1801 and 1804 the King again became ill; but recovered before it was necessary to take any steps to appoint a Regent.[4] In 1810 the King became finally mad. The precedent of 1788 was followed, in spite of the protests of the Whigs, who advocated the direct method of an address to the Prince of Wales.[5]

The ministers expecting, like their predecessors in 1788 to be dismissed by the regent, were not disposed to simplify the preliminary

[1] The speech of the solicitor-general, Parlt. Hist. xxvii 827-828.

[2] "It is called an estoppel or conclusion because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth," Co. Litt. 352a.

[3] Erskine May, Constitutional History i 195. [4] Ibid 195-206.

[5] Sir S. Romilly described the procedure as a "fraudulent trick"—"in matters of civil life, what would be said of a set of men joining together and making a contract for another in a state of insanity, and employing a person as his solicitor to affix his seal or his signature to such a deed? Should we not say that such a deed was a gross imposture, and absolutely null and void?" Cobbett, Parlt. Debates xviii 297; Lord Eldon maintained that this use of the great seal was a necessary fiction, and pointed out that to condemn all fictions was dangerous—it might "affect the course of judicial administration and even the private property of every man who heard him," ibid 459-460; in fact Lord Grenville spoke the truth when he said, ibid 454, "in whatever way they should proceed they must come to a legal fiction at last," for "if they were to proceed by address they could only set up a phantom instead of a reality" since the King was in being.

proceedings, and accelerate their own fall; while the opposition, impatient for office, objected to elaborate preliminaries,—as much, perhaps, for the delays which they occasioned, as for their hollow subtlety and uselessness.[1]

Eventually the bill was passed and sanctioned in accordance with the procedure devised in 1788.[2] It created the Prince of Wales Regent, subject to limitations upon his powers very similar to those provided by the bill of 1788.[3] It limited his power to assent to Acts of Parliament varying the succession to the throne, and varying the rights of the Churches of England and Scotland, in the same way that the power of Regents appointed during a minority had been limited.[4] It gave the care of the King's person, and the management of the King's household to the Queen, and appointed a Council to assist her.[5] Provision was made for the issue of money from the civil list to the Queen, the royal family, and the keeper of the privy purse, and for the care of the King's property.[6]

There has been no case of the insanity of a King since the reign of George III.[7] If such a case should occur it is very unlikely that Parliament would follow these precedents, and adopt this very circuitous method of dealing with the emergency. It would be much more likely to proceed by way of direct address to the person whom it chose to act as Regent.

Absence.

In the eleventh and twelfth centuries the justiciar acted for the King when he was absent in his foreign dominions.[8] When the office of justiciar was abolished, no permanent provision was made for the absence of the King. Edward I was absent when he succeeded; but an arrangement for this eventuality had been made in the last year of Henry III's reign—an arrangement confirmed by an assembly of the magnates in 1273.[9] Henry III's Chancellor the Archbishop of York, as first lord of the Council, assisted by Roger Mortimer and Robert Burnell carried on the government till Edward's return.[10] From that time down to the eighteenth century, the King, by his letters patent, generally appointed persons to carry on the government in his absence.[11] At the end of the seventeenth and in the eighteenth centuries,

[1] Erskine May, Constitutional History i 210. [2] 51 George III c. 1.
[3] §§ 8, 9, 10. [4] § 11; above 438. [5] §§ 13-19. [6] §§ 26-29.
[7] For the provision made in 1830 by 11 George IV and 1 William IV c. 23, for affixing the sign manual by a stamp on account of the King's illness, see Erskine May, Constitutional History i 216-219.
[8] Stubbs, C.H. i 392; vol. i 36. [9] Stubbs, op. cit. ii 113.
[10] Ibid 111-113.
[11] See the precedents of letters patent collected in the Common's Journals xliv 37-39.

the Lords Justices appointed for this purpose were members of cabinet.[1] It was only occasionally that Parliament intervened. Thus in 1689 it provided that Mary should carry on the government in the absence of William;[2] in 1707 provision was made for the appointment of Lords Justices to carry on the government between the death of Anne and the arrival of George I;[3] and in 1837 a similar provision was made for the event of the death of Victoria while her presumptive heir, the King of Hanover, was absent from the kingdom.[4] In modern times it has not been thought necessary to provide for the absence of the King.

The fact that the sovereign is absent from the realm does not impair the validity of any executive act done during such absence; and modern facilities of communication have enabled the king to give the royal assent to bills by commission, and to transact other business without inconvenience to the conduct of the government during his visits to the continent.[5]

(3) *The royal family.*

Certain members of the royal family—the Queen, the King's eldest son and heir, the wife of the King's eldest son and heir, and the King's eldest daughter unmarried—are protected by the law of treason.[6] The precedence in Parliament of the King's children, brothers, uncles, nephews, and brother's or sister's sons, is fixed by a statute of 1539.[7]

In 1717 George I submitted to the judges the question whether the guardianship and approbation of the marriages of his grandchildren belonged to him.[8] All the judges, except two,[9] gave an affirmative answer. They rightly held that, in this matter, the weight of authority proved that the law applicable to private persons, which gave the father the guardianship of his children and the right to consent to their marriages, did not apply to the Crown.[10] But this opinion said nothing as to the validity of a

[1] E. R. Turner, The Cabinet Council i 369, 404-405; for the commission of and instructions to the Lords Justices see Commons' Journals xliv 39-42.

[2] 2 William and Mary St. 1 c. 6. [3] 6 Anne c. 7 § 11.

[4] 7 William IV and 1 Victoria c. 72.

[5] Anson, The Crown (4th ed.) ii Pt. i 274.

[6] 25 Edward III St. 5 c. 2; vol. ii 449 n. 7; vol. iii 287-288.

[7] 31 Henry VIII c. 10 §§ 1 and 4.

[8] The Grand Opinion for the Prerogative concerning the Royal Family, Fortescue's Rep. 401-440.

[9] Price B., and Eyre J. who was also chancellor to the Prince of Wales, held that the guardianship of the King's grand-children belonged to their father, and the right to consent to their marriage belonged to the King, but "not exclusive of the prince their father," ibid at p. 439.

[10] "This subject, touching the power of a grandfather, may be treated of, either as a publick or a private right; it has been treated of pretty much as a private right by the two judges that differ, and by the counsel for the Prince of Wales, which I think is an error in the foundation of their argument; for it ought manifestly to be treated as *jus publicum*, such a right as our law books express it to be,

marriage contracted by a member of the royal family without the King's consent. According to this opinion it was a great offence to contract such a marriage,[1] but it was clear that the marriage was valid. In 1771 the marriages of the King's two brothers, the dukes of Cumberland and Gloucester, called attention to the question. In 1771 the duke of Cumberland married Mrs. Horton, the sister of that Colonel Luttrell who had been put forward by the court as the opponent of Wilkes; and shortly afterwards the duke of Gloucester made public the secret marriage which he had contracted with the dowager countess of Waldegrave, an illegitimate daughter of Sir Edward Walpole, the son of Sir Robert Walpole.[2] The King's answer was the Royal Marriage bill of 1772, which the King employed all his influence to force through Parliament substantially as it was drawn.[3]

The bill aroused considerable opposition in the House of Lords, and still greater opposition in the House of Commons.[4] In the discussion of the bill in the House of Commons Charles James Fox made his first appearance as an opponent of the government.[5] But the King was firm, and the bill went through. The Act[6] after reciting that "marriages in the royal family are of the highest importance to the state, and that therefore the Kings of this realm have ever been entrusted with the care and approbation thereof," provides that no descendant of the body of George II, other than the issue of princesses married into foreign families, should be capable of contracting a marriage without the King's consent.[7] A marriage contracted without such consent is null and void,[8] and persons assisting or present at such a marriage are liable to the penalties provided by the statute of præmunire.[9] But a descendant of George II over the age of twenty-five, after notice to the Privy Council, can, at the expiration of twelve months, contract a marriage without the

quod ad statum reipublicae spectat, and that makes it the king's prerogative, and that is the king's inheritance, as king of this realm, which is too great a point to be governed by the narrow rules of private property," *per* Fortescue J., The Grand Opinion for the Prerogative concerning the Royal Family, at p. 411.

[1] Ibid at p. 425 *per* Pratt J.

[2] Lecky, History of England iv 248; Erskine May, Constitutional History i 262-264.

[3] Correspondence of George III with Lord North i 91; Fortescue, Correspondence of George III ii nos. 1034-1037, 1042-1044; Erskine May, op. cit. i 266-269.

[4] Lecky, History of England iv 250-251; Parlt. Hist. xvii 386 seqq.; in the House of Lords the Lord Chancellor, Lord Bathurst, said that he had had a share in drawing it, and he refused to consent to any amendment, ibid 389; Horace Walpole, Letters (ed. Toynbee) viii 153-154 testifies to its unpopularity, and says that it was drawn by Lord Mansfield.

[5] Lecky, History of England iv 252.

[6] 12 George III c. 11.

[7] § 1

[8] § 1.

[9] § 3.

royal assent, unless within the twelve months both Houses of Parliament have expressed their disapprobation.[1]

The objection that the Act would, in course of time, include large numbers of persons very remotely connected with the royal family, was and is the most serious objection to it; and an amendment proposed in the House of Commons to limit the Act to the reign of George III, was only lost by eighteen votes.[2] But this and other theoretical objections urged against it have not materialized,[3] and the Act is still in force.[4] Its effect in rendering marriages of members of the royal family, celebrated without the consent of the Crown, null and void, is illustrated by the cases of *Heseltine v. Lady Augusta Murray*,[5] and *The Sussex Peerage Case*,[6] which arose out of the marriage of the duke of Sussex to Lady Murray in 1793.[7]

With two exceptions, it is only in these respects that the members of the royal family differ from other subjects of the King. These two exceptions are the Queen, and the heir to the throne.

The Queen.

A Queen may be either a Queen regnant, a Queen consort, or a Queen dowager. A Queen regnant holds exactly the same position as a King.[8] A Queen dowager is no longer protected by the law of treason.[9] But it is said that she cannot re-marry without the King's licence.[10] On remarriage she retains her style and dignity;[11] and she was always entitled to dower, although before her marriage she was an alien.[12] Which of the other privileges belonging to a Queen consort she continues to enjoy, seems to be uncertain.[13] It is the Queen consort who has many privileges which have, from the earliest times, given her a peculiar status. She has a peculiar status, first, as compared with other married women, and, secondly, as compared with other subjects of the King.

(i) As compared with other married women the Queen consort

[1] § 2. [2] Parlt. Hist. xvii 423.
[3] Lecky, History of England iv 252.
[4] For an attempt made by Lord Holland in 1820 to repeal it see Erskine May, op. cit. i 269 n. 1.
[5] (1794) 2 Add. Eccl. 400 n. (a). [6] (1844) 11 Cl. and Fin. 85.
[7] Erskine May, op. cit. i 270-271. [8] 1 Mary Stat. 3 c. 1.
[9] Bl. Comm. i 223.
[10] Second Instit. 18, citing a statute of 6 Henry VI; but it is doubtful if any such statute exists, see Bl. Comm. i 223 and Christian's note.
[11] Bl. Comm. i 223.
[12] Co. Litt. 31b; in 1421 this privilege was extended to other aliens if married with the Crown's licence, R.P. 8 Hy. V no. 15; Hargrave's notes to Co. Litt. no. 187; Rolle, Ab. i 675, *Dower* A. (3).
[13] Halsbury, Laws of England (2nd ed.) vi 439 n. (c).

has a peculiar status. She was always regarded as a *feme sole*, and was therefore subject to none of the proprietary disabilities of a *feme covert*.[1] It follows that she can own and dispose of property *inter vivos* or by will; she can take a grant of property even from the King; she can contract; and she can sue and be sued alone.[2] Coke said that the reason for this rule of law was to save the King the trouble of superintending his wife's business affairs.[3] But it is much more probable that the real reason is to be found in the fact that, from the earliest times, the law recognized that the Queen had a proprietary capacity,[4] and could not therefore be subject to the rule of the mature common law which denied any proprietary capacity to the married woman. We have seen that it was not till the second half of the thirteenth century that the common law rules as to the status of the married woman attained fixity;[5] and that, even then, there were survivals of the older ideas which gave her a proprietary capacity.[6] We shall now see that, in the case of the Queen, her proprietary capacity was so obvious, that it was clear that the rules of the mature common law as to the status of married women, could not be applied to her.

"The original revenue of our antient queens," says Blackstone,[7] "seems to have consisted in certain reservations or rents out of the demesne lands of the crown, which were expressly appropriated to her majesty, distinct from the king. It is frequent in domesday book, after specifying the rent due to the crown, to add likewise the quantity of gold or other renders reserved to the queen. These were frequently appropriated to particular purposes; to buy wool for her majesty's use, to purchase oil for her lamps, or to furnish her attire from head to

[1] Vol. iii 525 and n. 2; in Y.B. 11 Hy. IV Pasch. pl. 26 it was said that all manner of writs lay against the Queen "nient obstant le coverture."

[2] Co. Litt. 133a; Clarke v. Pennifather (1584) 4 Co. Rep. at f. 23*b*; Bl. Comm. i 218-219; Halsbury, Laws of England (2nd ed.) vi 437; The Crown Private Estates Act 1800, 39, 40 George III c. 88 §§ 8 and 9; this statute was probably declaratory of the common law of the sixteenth century; but according to Brian C.J., her privileges were more limited in the fifteenth century; she could only alienate for her life, and, it would seem, could not make a will; he said: "La Roine est sole personne per le Commune Ley, mes nemy a touts entents, mes a faire chose personel, come leases feffementes et hujusmodi, que sont bonnes pur temps de sa vie, mes nient plus: car puis le Roy eux aura"; it was to clear up this doubt that §§ 8 and 9 of the Crown Private Estates Act was passed, see preamble to § 8; the statute 1 Henry VIII c. 18, cited vol. iii 525 n. 2, shows that the extent of the Queen's capacity was not regarded as quite settled.

[3] "The wisdome of the common law would not have the King (whose continuall care and study is for the publicke, *et circa ardua regni*) to be troubled and disquieted for such private and petty causes: so as the wife of the King of England is of ability and capacity to grant and to take, to sue and be sued as a *feme sole* by the common law," Co. Litt. 133a.

[4] Blackstone notes, Comm. i 218, that her privileges are as old as the Saxon era.

[5] Vol. iii 522-525, 525-527, 542-544.

[6] Ibid 523.

[7] Comm. i 220.

foot." In addition she had the revenue which was known as "queen gold." [1]

All persons who made a voluntary offering or fine to the King of ten marks or upwards, in consideration of the grant of a privilege, licence, pardon or other royal favour, must pay to the Queen, as queen gold, ten per cent. more than the offering or fine.[2]

As if a hundred marks of silver be given to the king for liberty to take in mortmain, or to have a fair, market, park, chase, or free warren: then the queen is entitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold.[3]

No queen gold was payable on money grants made by Parliament or convocation [4]—though it apparently was due if a community compounded with the King for its liability under a Parliamentary grant; [5] nor for fines imposed on offenders, since these were not voluntary; nor for presents made to the King without consideration moving from him; nor on a sale of the royal possessions or revenues.[6] A release by the King of the whole or part of the sum due to him did not operate as a release from the obligation to pay queen gold, unless the queen consented.[7]

Queen gold is certainly as old as the Norman Conquest, and possibly older; [8] and it is specially treated of in the Dialogus de Scaccario.[9] It was then treated like other debts due to the King; and like them, was considered in later law to rank as a debt of record.[10] The Queen had her own officer in the Exchequer to see to its collection.[11] It was not peculiar to England. It appears that a similar sum was paid to the wives of the dukes of Aquitaine.[12] In England it was known only as a royal payment—possibly the common law rule as to the proprietary incapacity of married women prevented the growth of any such custom in favour of the wives of the great landowners.[13] But Prynne, not inaptly, compares it to the payments sometimes made to the wives of lords of manors when a copyhold lease was granted or renewed.[14]

[1] Dialogus de Scaccario Bk. ii § xxvi; W. Prynne, Aurum Reginae; (1607) Aurum Reginae 12 Co. Rep. 21; Fortescue's Rep. 398; Bl. Comm. i 219-222.

[2] "Ad haec noverint hii qui in pecunia numerata regi sponte se obligant, quod reginae similiter tenentur, licet expressum non fuerit. Quamvis autem non sit expressum, est tamen promisso compromissum; ut cum regi centum vel ducentas marcas promiserit, reginae paritur teneatur, pro centum marcis argenti regi promissis, in una marca auri; pro ducentis, in duabus marcis auri; et sic deinceps," Dialogus, Bk. ii § xxvi.

[3] Bl. Comm. i 220. [4] Prynne, op. cit. 6-7; Bl. Comm. i 220.

[5] 15 Edward III St. 3 c. 6; 31 Edward III St. 1 c. 13; Prynne, op. cit. 36.

[6] Ibid 6; Bl. Comm. i 220. [7] Prynne, op. cit. 7.

[8] Bl. Comm. i 221. [9] Bk. ii § xxvi. [10] Prynne, op. cit. 7

[11] Ibid; and see ibid 137 for a list of the Queen's collectors in the Exchequer; the "clericus reginae" is mentioned in the Dialogus.

[12] Ibid 22. [13] Vol. iii 525-527, 542-544. [14] Op. cit. 5.

The records printed by Prynne show that it was a valuable source of revenue all through the Middle Ages.[1] But from the reign of Edward VI to the reign of James I there was no Queen to claim it; and its nature and the conditions under which it could be levied became obscure. In 1605 William Hakewill, the solicitor-general to Anne, the Queen of James I, wrote a learned treatise upon it. He was, Prynne tells us, a man well versed in records, and a reader and bencher of Lincoln's Inn.[2] The publication of this treatise induced the King to refer the question of the Queen's rights to Coke, C.J., and Popham, C.B., to advise. They advised that the right was of little value;[3] and it was never exercised in James I's reign.[4] It was revived in 1635; but the King eventually gave Henrietta Maria £10,000 in lieu of it—"finding it perhaps too trifling and troublesome to levy."[5] The abolition of the military tenures and their incidents still further reduced its value; and nothing more was heard of it till, in 1668, that zealous antiquary Prynne,[6] who then held the post of the keeper of the King's records, published his treatise on the subject, in order to induce Catherine, Charles II's Queen, to assert her right to it.[7] It is an able treatise, and its criticism of Coke and Popham's report,[8] like his criticism of Coke's Fourth Institute,[9] is damaging. But it did not effect its object; and the levy of queen gold passed into desuetude.

(ii) The Queen is unlike an ordinary subject in that she shares some of those incidental prerogatives[10] which belong to the King. It is true that, unlike the King, she could always be sued like an ordinary subject[11]—indeed, the fact that the King could not be sued may have helped to convince the lawyers that it was expedient that the Queen should be given the capacity of a *feme sole*.[12] But she has in a minor degree many of the King's incidental prerogatives. Thus, she need find no pledges to prosecute, nor can she be amerced;[13] and from these privileges it follows, in Blackstone's opinion, that, like the King, she neither pays nor receives costs.[14] She pays no toll;[15] and she had privileges with reference to distraining upon her tenants similar to

[1] Thus in the Hilary term of 8 Edward III £580 were paid to the Queen, Prynne, op. cit. 109.

[2] Ibid 123. [3] 12 Co. Rep. at p. 22. [4] Bl. Comm. i 221.

[5] Ibid. [6] For Prynne and his works see vol. v 405-407.

[7] He admitted that the "richest veins were cut off" by the Act abolishing the military tenures, and said that "the remaining branches are in great danger to be totally lost"; to obviate this he wrote his treatise.

[8] Op. cit. 124-125. [9] Vol. i 553-554, 558; vol. v 476 and n. 2.

[10] Above 342-357.

[11] "Neither shall the queene be sued by petition, but by a *praecipe*," Co. Litt. 133b.

[12] Vol. iii 525 n. 2. [13] Co. Litt. 133a.

[14] Bl. Comm. iii 400. [15] Co. Litt. 133b.

those possessed by the King.[1] "In case of aide prier of the queene, it is said *domina regina inconsulta*, and the cause of the aide prier shall not be counterpleaded, no more than in the king's case."[2] "On the taking of a whale on the coasts, which is a royal fish it shall be divided between the king and queen; the head only being the king's property, and the tail of it the queen's."[3]

We have seen that the Queen had her separate officer in the Exchequer to see to her right to queen gold.[4] Similarly she had her attorney and solicitor-general who sat within the bar of the courts with the King's counsel.[5]

She is crowned with the King—the ceremony being generally performed by the Archbishop of York.[6] We have seen that her life and her chastity are protected by the law of treason.[7] If she is accused of treason (as was Anne Boleyn) she is tried by her peers.[8]

The husband of a Queen regnant has none of the privileges of a Queen consort. Any privileges which he has must be specially conferred upon him by statute or letters patent.[9]

The heir to the throne.

The eldest son of the King is the heir-apparent. As eldest son and heir-apparent he is by birth and inheritance duke of Cornwall.[10] Whether a second son, who becomes heir-apparent by the death of his brother without issue, inherits the dukedom is not certain.[11] But it is clear that the eldest son of the

[1] "If the tenant of the queene alien a certaine part of his tenancie to one, and another part to another, the queene may distraine in any one part for the whole, as the king may doe; but other lords shall distraine but for the rate," Co. Litt. 133b.

[2] Ibid.

[3] Bl. Comm. i 223; Blackstone is here copying Prynne, op. cit. 127, and he adds "the reason of this whimsical division, as assigned by our antient records, was to furnish the queen's wardrobe with whalebone"; as Christian points out "the reason is more whimsical than the division, for the whale bone lies entirely in the head"; Blackstone did not invent this reason, as some of his critics imply, see Dicey, Blackstone's Commentaries, Camb. Law Journal iv 292: he was merely repeating what he found in his authorities; for royal fish see above 350.

[4] Above 450.

[5] Bl. Comm. i 219; Prynne, op. cit. 138 gives a list of the Queen's attornies.

[6] Halsbury, Laws of England (2nd ed.) vi 438.

[7] Above 446. [8] Coke, Third Instit. 7.

[9] Halsbury, Laws of England (2nd ed.) vi 438-439

[10] Bl. Comm. i 224.

[11] Coke, in the Prince's Case (1605) 8 Co. Rep. at f. 30*a* holds that he does not, and he is followed by Christian in his note to Bl. Comm. i 224; the contrary view is taken by Selden, Titles of Honour, Works vi 776, by Lord Hardwicke in the case of Lomax v. Holmden (1749) 1 Ves. Sen. at pp. 294-295, and by Blackstone; the question turns on the interpretation to be placed on the word "primogenitus" in the original grant to the Black Prince; there is something to be said for Coke's view, if regard is paid only to the literal construction of the word; but Lord Hardwicke's precedents seem to shew that it was extended to mean a son who, though not "primogenitus" at birth, had afterwards become so by the death of his elder brother.

heir-apparent does not, on the death of his father, become duke of Cornwall.[1] The eldest son is generally created Prince of Wales and earl of Chester.[2] Both Mary and Elizabeth were created Princesses of Wales ;[3] but it is not usual to confer this title on a woman, as she can never be more than an heiress-presumptive ; nor is it usual to confer it on an heir-presumptive.[4]

The heir-apparent and his wife, if the heir-apparent is in the direct line, are protected by the law of treason.[5] Statutory provision is made for his maintenance,[6] and for the management of his household.[7]

We must now turn to the more important topic of the councils, ministers and departments of state, through which are exercised either the powers vested in the King by the prerogative or by statute, or the statutory powers conferred on these councils, ministers, or departments of state.

Councils, Ministers, and Departments of State

Most of the officials through whom the local government was conducted, and all the officials through whom the central government was conducted, were the King's servants. They were appointed and could be dismissed by the Crown. But there was an important distinction between the officials of the local government and the officials of the central government which is pointed out by Blackstone.[8] For the most part the officials of the local government acted by virtue of powers conferred upon them by the common law or by statute, and they were personally liable for the misuser or for the non-user of their powers ;[9] but, for the most part, the officials of the central government acted, not by virtue of powers conferred upon them by the common law or by statute, but as the King's agents exercising his prerogative. Hence Blackstone could say that the powers of the great officers of state were not defined by the laws, nor were they personally invested with " any very important share of magistracy." The greater part of their powers was derived from the royal prerogative, which they exercised as the agents of the King ;[10] and

[1] The Prince's Case (1605) 8 Co. Rep. at f. 30*a* ; Hale, P.C. i 125-126 ; and cp 33 George II c. 10 enabling the King to grant leases of the duchy lands, though his grandson was then Prince of Wales.

[2] Bl. Comm. i 224. [3] Ibid 224 n. (7). [4] Ibid.

[5] Above 446 ; Coke, Third Instit. 8, 9. [6] See 1 Edward VII c. 4.

[7] 35 George III c. 125. [8] Comm. i 338-339.

[9] Above 157, 246-249, 253.

[10] " And herein we are not to investigate the powers and duties of his majesty's great officers of state, the lord treasurer, lord chamberlain, the principal secretaries, or the like ; because I do not know that they are in that capacity in any considerable degree the objects of our laws, or have any very important share of magistracy

the same proposition is true of the powers which they exercised collectively as the members of the cabinet.[1]

This distinction drawn by Blackstone between the great officials of the central government and the officials of the local government was not entirely true when he wrote. He admits that the law had given the secretaries of state "the power of commitment in order to bring offenders to trial"; and there were other cases in which powers and duties had been conferred or placed on the officials of the central government. Thus the officials who had the custody of the King's seals and their clerks, were bound by rules which defined the conditions under which they must set these seals to the documents which were brought before them.[2] With regard to the issue of money from the Exchequer, statutory duties were imposed on the tellers, auditor, and other officials of the Exchequer as to the conditions under which they could issue money.[3] The Acts which appropriated supplies to particular services, laid many duties upon the lords of the Treasury and other officials, with respect to their dealings with the money granted by Parliament.[4] The Act of 1710,[5] which created the office of postmaster-general, gave many powers and placed many duties upon him; and an Act of 1785[6] gave the commissioners for stamps various powers necessary for the enforcement and the regulation of the duties which it imposed on post horses and carriages. The powers given to the commissioners of customs and excise aroused the apprehensions of Blackstone,[7] and the active dislike of Dr. Johnson;[8] and they were the occasion of hostile motions in the House of Commons.[9]

conferred upon them: except that the secretaries of state are allowed the power of commitment in order to bring offenders to trial. . . . But the magistrates and officers, whose rights and duties it will be proper in this chapter to consider . . . are principally sheriffs; coroners; justices of the peace; constables; surveyors of highways; and overseers of the poor," Bl. Comm. i 338-339.

[1] "A cabinet was a meeting of the principal servants and ministers of the king. Often the king was present: then they sat solely to advise and assist him. When he was not at cabinet or committee still they were supposed to be his servants working solely under his authority and in his behalf, and awaiting his sanction for whatever they proposed to have done," E. R. Turner, The Cabinet Council i 428; for the evolution of the cabinet see below 470-481.

[2] 27 Henry VIII c. 11. [3] 8, 9 William III c. 28.

[4] This is apparent from a cursory glance at any of the annual Finance Acts passed in the eighteenth century; for instance in the Finance Act of 1751, 24 George II c. 47 rules are made as to the application of money voted for halfpay to army officers (§ 21) and as to making duplicates of lost exchequer bills, and their signature by commissioners of the Treasury (§§ 23, 24).

[5] 9 Anne c. 10. [6] 25 George III c. 51, §§ 5 and 51.

[7] "The power of these officers of the crown over the property of the people is increased to a very formidable height," Comm. iv 281; above 418-419.

[8] His definition of "Excise" in his dictionary runs as follows: "a hateful tax levied upon commodities, and adjudged not by the common judges of property, but wretches hired by those to whom Excise is paid."

[9] In 1786 and 1790 proposals were made in the House of Commons that, in certain proceedings taken by these commissioners, the defendant should have the

But, when all deductions have been made, it was true, when Blackstone wrote, that the greatest and most important of the powers exercised by the great officials of the state, were prerogative powers, exercised by them as agents of the King, and not powers vested in them personally by the law. It was generally true to say that the supreme executive power in the state was vested in the King, and depended upon his prerogative. That is not so true to-day, as Maitland has pointed out.[1] Though the executive power to-day rests partly on the prerogative, it rests to an increasing extent on statutory powers given to ministers and boards. But, in the eighteenth century, statutes giving these powers were rare. It is a mainly modern development, a development "which began, we may say, about the time of the Reform Bill of 1832." [2]

In the eighteenth century, then, the powers of the central government rested mainly upon the prerogative. They were exercised through a number of councils, ministers, and departments of state, composed of the King's servants, who, according to the legal theory of the constitution, advised the King as to the exercise of his prerogatives. In fact they often exercised them according to their own discretion, but in legal theory they exercised them only as the agents of the King. All through the eighteenth century, and right down to the reforms of the nineteenth century, these councils, ministers, and departments of state were the component parts of a governmental machinery of extraordinary complexity. We have seen that, in the sphere of local government, continuity of development and the manner in which new officials and institutions had been pieced on to and amalgamated with old officials and institutions, had produced a system in which the expedients of all the centuries, from the twelfth to the eighteenth, had met and blended.[3] This characteristic is still more evident in the sphere of central government. Since the machinery of central government centred round the prerogative, and since, the prerogative has been the least susceptible to change of any of the institutions of English law,[4] many survivals from all periods in the history of that law characterized that machinery in the eighteenth century, and some of them have survived the following century of reform.

The machinery through which the prerogative was exercised

option of being tried by a jury, Parlt. Hist. xxvi 117-120, xxviii 744, 748; in 1790 it was also proposed that, in actions against excise officers for illegal acts, it should not be possible to plead a conviction in bar of the action, ibid xxviii 231-257; but these proposals were rejected because it was realized that these powers were necessary for the efficient collection of the revenue, ibid xxvi 120, 177-178, xxviii 749-750; both Lord Camden, Parlt. Hist. xxvi 177-178, and Blackstone, Comm. iv 281, defended them on this ground.

[1] Constitutional History 416-417.
[2] Ibid 417.
[3] Above 136.
[4] Above 346.

was supplied by the councils from which the King sought advice, and by the officials of the King's court and household, who were the leading members of these councils. That machinery had grown more elaborate as the state had grown in size, and as its government had grown in complexity and power. This phenomenon is apparent in the development both of the councils from which the King sought advice, and of separate departments of government controlled by the higher officials of the state. From the twelfth to the seventeenth century, the history of the machinery through which the King exercised his prerogative, is, for the most part, the history of a series of new developments in the King's court and household, designed either to increase the royal control over the executive government, or to supply the new machinery demanded by changed political, social, or economic conditions. We can trace this development first in the history of the councils of the Crown, and secondly, in the history of some of the ministers of the Crown and the departments over which they presided.

(1) The Curia Regis was staffed by the principal officers of the King's court and household, and by the leading tenants-in-chief.[1] Sometimes it was a large assembly, sometimes a small assembly of some of the principal officials.[2] From the large assemblies which gave counsel to the King, and with the help of which he passed laws and decided important cases, there had developed a House of Lords;[3] and from the elected representatives of the counties and boroughs, summoned to the King's court to grant aids to the King and to give him advice, there had developed a House of Commons.[4] The two Houses had become a Parliament which, in the Middle Ages, had gained powers of legislation and taxation, and had asserted its right to control the ministers of the Crown.[5] From the smaller assemblies of the Curia a Council had developed which had become the executive government of the kingdom.[6] At the close of the mediæval period government through the Council controlled by Parliament had broken down; and Fortescue had pointed out that a reform of the Council was the only cure for that want of governance from which England was suffering.[7] That reform had been effected by the Tudors. The Tudor Privy Council was an assembly composed of the chief officials of the King's court and household, and other councillors chosen by the King.[8] Throughout the sixteenth and early seventeenth centuries that

[1] Vol. i 32-33. [2] Ibid 35. [3] Ibid 352-358; vol. ii 302.
[4] Vol. i 352, 356; vol. ii 302. [5] Ibid 429, 435-440, 408-10.
[6] Vol. i 477-479, 480-482. [7] Ibid 483-485; vol. ii 570-571.
[8] Vol. i 492; vol. iv 64-67; Professor Pollard has pointed out, E.H.R. xxxvii 340 that the King's council was part of his household "just as a council was also a part of the household of any magnate."

Council governed England. Acting as a whole, or through its committees, or through commissions which it appointed,[1] it carried England through the transition from mediæval to modern conditions.[2]

After the Restoration the executive government of the country continued to be vested in the King and his Privy Council.[3] But it was obvious that the Council was becoming too large for executive work. The King wanted a more manageable body for the discussion of important questions of foreign and domestic policy, a body which could act with secrecy and despatch. Therefore, after the Restoration, a tendency to reserve important business for a committee of the Council composed of the most trusted of the King's ministers—a tendency the beginnings of which we can see in the earlier part of the seventeenth century[4]—rapidly made way.[5] From this committee a cabinet was developed during the latter part of the seventeenth century.[6] This cabinet was composed of the principal officers of the King's court and household. It was therefore another development from that court and household, comparable to the development which, at an earlier period, had resulted in the creation of the Tudor Privy Council.[7] Both developments were designed to give the country an efficient executive, and to give the King a larger control over the executive; and, because it gave the King this larger control, and made it difficult to render ministers responsible for the policy which they had advised, or to which they had assented, its existence was frequently made a matter of complaint by Parliament.[8]

Even before the Revolution, the position attained by Parliament was making it evident that the government could not be effectively carried on in the face of Parliamentary opposition.[9] This fact was still more evident after the Revolution, since Parliament was now the predominant partner in the constitution;[10] but the King still chose the ministers which formed his cabinet.[11] Then, as now, they were the King's servants. But then they owed their offices to his personal choice. It is true that he could not keep in office a minister or a set of ministers to

[1] Vol. iv 67-70. [2] Vol. i 507-508; vol. iv 70-107.

[3] "For the most part the government of England was still vested in the king, and for the most part it was still carried on by the monarch assisted by his ministers and council. After a short interval, it is true, parliament began encroaching or making trouble; but for some time it was able to do little more than thwart and control by opposing. Not until after 1688 did parliament really begin to take much of the government into its own hands; and then it attained this object mostly by getting control of and establishing close relations with the ministers who had formerly had their principal relations with the crown," E. R. Turner, The Privy Council i 381.

[4] Below 470. [5] Below 470-472. [6] Below 472-474.

[7] Above 456 n. 8. [8] Vol. vi 259-262; below 477-478.

[9] Vol. vi 161-163, 174-176. [10] Ibid 261. [11] Ibid.

whom Parliament definitely objected.[1] But, all through the eighteenth century, the King had a considerable freedom of choice in the selection of his ministers; and those ministers were regarded as being responsible both to him and to Parliament.[2] The growth of a new Whig party, in opposition to the policy pursued by George III, was beginning to introduce a change in the last quarter of the eighteenth century.[3] The responsibility of the cabinet to Parliament was increased, and its responsibility to the King was diminished. It was becoming a more homogeneous body, which represented the party which could command a majority in the House of Commons.[4] It followed that the King's power to choose his ministers was curtailed, because those ministers were coming to be the nominees of a party rather than the nominees of the King.[5] It followed also that new developments in the constitution of the executive no longer originated, as in earlier periods of history, from the King's court and household, but from statutes passed by Parliament to provide the requisite machinery for carrying on the government according to the wishes of the nation.

But, in the eighteenth century, we can only see the beginnings of this process. Cabinet government, as we know it to-day, was only in its initial stages. Though the King could not govern in defiance of the clearly expressed wishes of Parliament, he still had a very real discretion in the choice of his ministers, and a very real voice in shaping the policy of the state.[6] That he had these powers is due to two allied causes—the manner in which the royal household and the departments of government were staffed [7] and paid,[8] and the constitution of the unreformed Parliament.[9] The arrangements made for staffing and paying the officials of the state and royal household gave the King a vast patronage; and, in addition, he was the fountain of honour. He therefore had many means of controlling and influencing a Parliament which, in its unreformed state, it was easy to control and influence.[10] These were the two operative causes which made it possible to maintain that balanced eighteenth-century constitution which many statesmen and publicists, English and foreign, united in praising. With the manner in which the constitution of the unreformed Parliament facilitated the exercise of royal control and influence, and so created a conventional link between the executive and the legislature, I shall deal later.[11] At this point I must say something of the ministers of the Crown and the departments of the central government, through which

[1] Above 76; below 636.
[2] Above 76; below 638, 641.
[3] Above 102; below 642-643.
[4] Below 642-643.
[5] Below 642.
[6] Above 61; below 638.
[7] Below 459-460.
[8] Below 482-485.
[9] Below 577-580.
[10] Below 580.
[11] Below 632-634.

the King, assisted by his Privy Council and Cabinet, exercised his prerogative, and through which he was able to influence Parliament, and thus to play a considerable part in the government of the state and in the direction of its policy.

(2) The history of the ministers of the Crown, and the departments of the central government over which they presided, is a history as long and as continuous as the history of the councils of the Crown.

In the Middle Ages separate departments of government had split off from the King's court and household; and the officials at the head of these departments had become important ministers of state, entirely separate from the King's household. The law courts, the Exchequer, and the Chancery were independent departments in the fourteenth century. But the King always wished to retain for himself an independent sphere of action, and therefore we get developments in the evolution of the King's ministers and the departments of state, similar to the developments in the evolution of the councils of the Crown which I have just described. Partly because the King wished to retain control, partly because changing political social and economic conditions necessitated changes in and an elaboration of the machinery of government, the King created new household officials and departments of government in more immediate touch with himself. For both these reasons new officials and new departments of government were evolved from the King's household right down to the seventeenth century. Thus, the departmental organization of the household and the wardrobe was used in the thirteenth and fourteenth centuries to give the King a control over finance independent of the Exchequer;[1] and, during the same period, the King's privy seal became the seal of the wardrobe, and was used by the King instead of the great seal, which was in the hands of a chancellor who was less under his personal control.[2] In Henry VII and Henry VIII's reigns a new organization of finance, emanating from the King's household, was evolved.[3] During the same period the growth in the importance of the King's secretary foreshadows the development of many of our modern

[1] Tout, Chapters in Medieval Administrative History i 20-21.

[2] Ibid 23.

[3] A. P. Newton, The King's Chamber under the Early Tudors, E.H.R. xxxii 348-371; Mr. Newton says at pp. 349-350, "Henry VII in his reconstruction designedly turned away from the old machinery of collecting revenue through the exchequer of receipt, and fixed upon an expansion of the methods of finance of the king's chamber as the most fitted for his purposes, and for establishing and making permanent the régime that was destined to bring to England lasting peace after the anarchy of dynastic war. The system that he established endured throughout his own reign and those of his son and grandson, and when, in the reign of Mary, the exchequer was again set up as the supreme financial machine of the realm, it was an exchequer that differed much from the exchequer of an earlier time."

ministries.[1] A large number of these newer officials, which emanated from the royal household, came to be, like the older officials, dissociated from the household, and the heads of separate departments of state—this was the case, for instance, with the lord privy seal, and the secretaries of state. But in the cabinets of the eighteenth century the chief officials of the King's household took their places by the side of the ministers of the state, just as they had done in the Privy Council of the Tudors and the Stuarts.[2]

Thus in the eighteenth, as in earlier centuries, the machinery of central government was in the hands of officials, some mediæval and some relatively modern, who had originated as officials of the King's household, and had developed into ministers at the head of departments of state. But in the eighteenth century there were signs that the procreative capacity of the King's household was becoming exhausted. From the sixteenth century onwards some new officials had been created by the Crown [3] or by statute [4] to meet the new needs of the modern state. As the importance of the Crown and the royal household declines, as the great departments of state grow in importance, and as the control of Parliament is strengthened, the needs of the executive government will be more and more supplied by direct new creation, statutory or otherwise, and less and less by developments within the royal household.

This development had begun in the eighteenth century. It was a development parallel to and connected with, the development which was curtailing the King's power of chosing his ministers freely ; and it was making those ministers more closely dependent upon the majority in the House of Commons.[5] But, like the latter development, it had not gone far during the first three-quarters of the eighteenth century. We shall see that its first manifestations were Burke's Act of 1782,[6] which effected considerable reforms in the King's household and some of the departments of state, and Pitt's measures of financial reform.[7] One of the objects of Burke's Act was to diminish the indirect control, which the King possessed over Parliament, by abolishing useless officers who, by means of the Crown's influence secured seats in Parliament, and made up the party of the King's friends.[8] But Burke did not wish to diminish the control which, by virtue

[1] Vol. iv 66-67 ; below 493-498. [2] Below 639.

[3] For instance the office of Secretary at War was created by Charles II, Anson, The Crown (4th ed.) ii Pt. ii 325.

[4] Thus 6 Henry VIII c. 24 § 21, and 7 Henry VIII c. 7 § 26 created the office of General Surveyor of the Crown lands, whose powers were further defined by 14, 15 Henry VIII c. 15.

[5] Above 636. [6] 22 George III c. 82 ; above 107 ; below 522.

[7] Above 120-122. [8] Above 107 ; below 519.

of his prerogative, the King possessed over the machinery of central government; nor did he or anyone else see that the growth of the independence of Parliament would have the result of diminishing it, and therefore of curtailing the free exercise by the Crown of its prerogatives. Just as the lawyers refused to separate the two capacities of the King—his capacity as a natural man, and his capacity as a corporation sole;[1] so statesmen refused to separate the service of the King's household from the civil service of the state. On the King's civil list both these services were charged.[2] Parliament voted an annual sum to the King; and from that sum he must pay both the expenses of his household and the ordinary expenses of the state. As in the Middle Ages, he was expected "to live of his own"; and, as in the Middle Ages, that meant that "his own" must bear the charges of his own establishment and of the civil service of the state. It was not till it was recognized that the King's ministers were dependent upon Parliament rather than upon the King, that the distinction between the service of the state and the service of the King's household began to be perceived. It was not till then that the service of the state was gradually divorced from its old connection with the service of the King's household; that the expenses of the civil servants of the state were removed from the civil list; and that the civil list was confined to the personal expenses of the King and his household.[3]

All these developments, though foreshadowed in the last quarter of the eighteenth century, had not then taken place—still less had anyone realized the change in the balance of the constitution, and the consequent change in constitutional theory, which they implied. During the eighteenth century the higher officials of the kingdom were, for the most part, connected in respect of their origin, and some were still connected in respect of their duties, with the royal household. They represented, historically, different periods in the growth of the machinery by which the central government of the state was conducted. In the order of their date they can be grouped as follows:

First, there were the great hereditary and honorary offices, such as the Earl Marshal and the Lord Great Chamberlain, which represent the earliest organization of the royal household.[4] They had long ceased to perform any important functions in the actual conduct of the government. Secondly, there were the officials who still had functions to perform in connection with the King's household, such as the Lord Steward, the Lord

[1] Vol. ix 5. [2] Below 482. [3] Below 484-485.

[4] Anson, The Crown (4th ed.) i Pt. i 157; the claims to exercise many offices, of this nature, which have long been obsolete, emerge before the coronation of a new King see Halsbury, Laws of England (2nd ed.) vi 404-407.

Chamberlain, the Controller of the Household. Some of these were cabinet offices during the greater part of the eighteenth century; and, though no longer cabinet offices, till 1924 they changed hands on a change of ministry.[1] Thirdly, there were officials, such as the Lord Chancellor, the Lord High Treasurer, the Lord Privy Seal, the Lord High Admiral, who had become officials of the state, separate from the King's household, and the heads of departments, during the mediæval period. Fourthly, there were officials who had come to the front in the sixteenth and later centuries. They were either later emanations from the royal household, or they were specially created by the Crown or by statute. Of the first class by far the most important were the Secretaries of State, who had become officials of the state, and heads of departments in the seventeenth century.[2] Of the second class we can take as illustrations the Secretary at War and the Postmaster-General.[3] Thus the machinery of central government, like the machinery of local government, consisted of a mass of officials and departments which came from very different periods in English history. Like the machinery of local government, it was heterogeneous and badly organized; and the confusion was increased, first by the existence of a class of high officials who held lucrative sinecures, and, secondly, by the haphazard and unregulated growth of large numbers of subordinate officials.

First, we have seen, when dealing with the history of the judicial system, that the official staffs of the courts originated at a time when the Crown, when it wished to appoint an official, did not make a contract with the official to do certain duties at a certain salary, but granted him the right to exercise the office, sometimes in fee simple, but more often for life or years, and to take certain fees.[4] The result of the grant was to create a proprietary right in the office which Blackstone classed as an incorporeal hereditament.[5] We have seen that in many cases these offices became extraordinarily valuable as the business of the courts expanded; but that, since these offices were freehold offices, it was impossible to appoint new officials to do the extra work—such an appointment would have amounted to a disseisin of the office-holder.[6] These office-holders appointed

[1] Anson, op. cit. 157-158; below 639.
[2] Below 493-498.
[3] Above 460 n. 3.
[4] Vol. i 247
[5] Comm. ii 36; vol. i 248; the preamble to 27 George II c. 17, an Act to revest in the Crown the power to appoint the Marshal of the Marshalsea of the King's Bench—gives an instructive abstract of the devolution of this freehold office, and is a striking proof of its proprietary characteristics.
[6] Some apprehension was expressed in the House of Lords in 1707 as to the effect of the Act of Union on the title to English heritable offices, since there was no saving in the Act for them as there was for Scotch heritable offices, Parlt. Hist. vi 567.

deputies at a small wage who in time came to do, in some cases all, and in other cases nearly all, the work.[1] Hence their offices became valuable sinecures, and hence, too, the natural development of the official staffs of the courts was perverted. We shall see that what went on in the courts went on also in other departments of the government and of the King's household.[2] What I have said of the courts is true also of very many of these departments: "At the beginning of the nineteenth century, there was a regular hierarchy of officials—at the top there were the dignified officials who took large sums for doing nothing, and at the bottom there were the poorly paid clerks who did the work."[3]

Secondly, the fact that these office-holders had a proprietary interest in their offices made them very independent. They could appoint what deputies they pleased to perform the duties of their office. This independence spelt autonomy. Offices expanded, and performed their functions, with very little external interference. The autonomy which made for the expansion on a small scale of the offices of local government,[4] was repeated on a great scale in the offices of the central government and of the King's household. Such offices, for instance, as were concerned with the collection of different branches of the revenue, and with the army and navy, expanded enormously during the eighteenth century; and, as we have seen, caused Blackstone to reflect upon, and Burke to denounce, the added influence which all this patronage gave to the Crown.[5]

Some knowledge of this complex organization of councils, ministers, and departments of state is essential if we would understand, first, some of the most important characteristics of the public law of the eighteenth century; secondly, the manner in which it worked; and thirdly, the theory of the constitution to which it gave rise. (i) It was characterized by enormous and expensive anomalies which made for inefficiency. But, in spite of this handicap, it gave the state an executive government which was financially sound, a government which enabled England to compete successfully with her continental rivals, and to win her overseas Dominions and her Indian Empire. In spite of its anomalies, this complex organization was capable of expanding to meet the new needs of the state; and it was the foundation upon which our modern machinery of government was built up by the reformers of the nineteenth century. (ii) The anomalies of this system, coupled with the anomalies in the electoral and representative system, worked together to produce a series of conventions, which were the secret of the efficient working of the eighteenth-century constitution of balanced

[1] Vol. i 249-250, 256-257. [2] Below 501-503. [3] Vol. i 257.
[4] Above 222-234. [5] Above 418-419.

and partially separated powers.[1] Those conventions were very different from the conventions which underlay the monarchical Tudor constitution,[2] and from the conventions which underlie our modern democratic constitution.[3] They were not, like the Tudor conventions, directed to secure the predominance of the Crown, nor, like the nineteenth-century conventions, to secure the predominance of the House of Commons. They were directed to secure the balance of power as between the King, the House of Lords, and the House of Commons. (iii) The working of the constitution by means of these conventions gave rise to the classic theory of the constitution according to which its excellencies were due, first, to the division of powers in the constitution, and, secondly, to the balance which it maintained between the elements of monarchy, aristocracy, and democracy.[4]

With all these points I shall deal in more detail later in this chapter. But their significance cannot be appreciated without a preliminary knowledge of the eighteenth-century organization of councils, ministers, and departments of state. That organization bridges the period which lies between the organization of government under the autocratic rule of the Tudors and the Stuarts, and its organization under our modern Parliamentary monarchy. Therefore at this point I must deal very shortly with the manner in which the machinery of central government developed in this transition period of balanced and partially separated powers. I shall say something, first, of the Privy Council and its committees; secondly, of the beginnings of the cabinet; and thirdly, of the chief officials of the state and royal household and of their departments.

(1) *The Privy Council and its Committees.*

Down to the great rebellion the Privy Council was the governing body in the state.[5] The majority of its members were the heads of the great departments of state or high officials of the royal court and household.[6] Necessarily it did much of its work through committees;[7] and it sometimes appointed commissions, not necessarily consisting of privy councillors, for certain defined pieces of judicial and administrative work.[8] By these means it governed the country, and exercised a minute and careful supervision over the other organs of government—over the provincial councils, the local government, the national church, the courts, and Parliament. As the result of its work the

[1] Below 630, 635.
[2] Vol. vi 4-5.
[3] Below 631.
[4] Below 721-722.
[5] Vol. iv 60-107; vol. vi 56-58, 69-75.
[6] Vol. iv 65.
[7] Ibid 67.
[8] Ibid 68-70.

lawlessness of the Middle Ages was brought to an end, and England became a territorial state of the modern type.[1]

The outbreak of the great rebellion put an end to the government of England by the Privy Council.[2] The Privy Council was restored in 1660; but its position in the state was changed, because definite limitations had been set to the royal prerogative by the law, and because Parliament could criticize and sometimes control the manner in which the King exercised his prerogatives.[3] In form, however, the Privy Council, like the King, seemed to be restored to its old position. It was shorn indeed of its judicial powers;[4] but its administrative powers, derived from the fact that it was the agency through which the King exercised his prerogative, seemed to be intact; and the manner in which, for the conduct of business, it organized itself into committees, seemed to reproduce the conditions which existed before the great rebellion.[5] Clarendon, whose political ideas were still those of the statesmen of 1641,[6] did not see that, though the forms remained, the position of the Privy Council after 1660 was not the same as the position which it held in 1641. Writing after his banishment in 1672, he described the Privy Council as the body which was the most sacred, and had the greatest authority in the state, next to the King;[7] and he gave it as his opinion that "no king of England can so well secure his own just prerogative, or preserve it from violation, as by a strict defending and supporting the dignity of his privy-council."[8]

[1] That the Privy Council occupied much the same position from 1603 down to the outbreak of the great rebellion as it occupied in the Tudor period, and that its organization and procedure were much the same is clear from E. R. Turner's book on The Privy Council in the Seventeenth and Eighteenth Centuries i chaps. iv-vii; ii chap. xxii; the main difference is that in the later period a foreign committee of the most important statesmen is emerging which will develop into the cabinet, below 470, 471.

[2] "With the overthrow of the king in 1645 the privy council of England actually, though not legally ceased to exist for a time; and while after 1649 the exiled Stuart heir sometimes held meetings of a few of his faithful followers who considered him king and whom he called his privy council, there was no more of monarchy or king's council in England until he returned as Charles II and established his privy council in May 1660," E. R. Turner, The Privy Council i 215.

[3] Vol. vi 161-163, 174.

[4] Ibid 112, 162; it is only occasionally that the Council seems to have arrogated to itself powers of a judicial character, vol. vi 216 n. 1; E. R. Turner, op. cit. ii 158-161; it had and continued to have the power to examine suspects and to commit them to prison, ibid ii 161-165; below 661-662.

[5] E. R. Turner, op. cit. ii 262-271.

[6] Vol. vi 175-176.

[7] "By the constitution of the kingdom, and the very laws and customs of the nation, as the privy council and every member of it is of the king's sole choice and election of him to that trust (for the greatest office in the state, though conferred likewise by the king himself, doth not qualify the officer to be of the privy council, or to be present in it, before by a new assignation that honour is bestowed on him, and that he be sworn of the council); so the body of it is the most sacred, and hath the greatest authority in the government of the state, next the person of the king himself, to whom all other powers are equally subject," Continuation of the Life of Clarendon (ed. 1843) 1189.

[8] Ibid 1189-1190.

When Clarendon was writing, the Privy Council was rapidly ceasing to occupy the position in the state which he ascribed to it. In the latter part of the seventeenth century the Council was beginning to become a formal and ceremonial body, which did little more than register decisions reached either by its own committees,[1] or by the ministers acting collectively in the cabinet,[2] or acting individually as the heads of the departments of government.[3] Down to the end of the seventeenth century, it is true, both temporary and standing committees of the Council continued to be appointed;[4] and one of the first acts of William and Mary after the Revolution was to appoint standing committees for Ireland, for Trade and Foreign Plantations, and for the affairs of Jersey and Guernsey.[5] But, later in the reign, these separate committees tended to become merged in a committee of the whole Council;[6] and, by the middle of the eighteenth century, this process was complete.[7]

The Privy Council itself had become a formal and ceremonial body.[8] But some of its committees, which had become committees of the whole Council, still performed governmental functions. One was the committee for trade and the plantations,[9] which, in the nineteenth century, became the Board of Trade;[10] and another was the committee to hear appeals from the plantations which, as reconstituted by statute in 1833, became the Judicial Committee of the Privy Council.[11] In 1839 another committee of the Council was created to administer the grant made in aid of voluntary contributions for public elementary education, which became in 1899 the Board of Education.[12]

[1] Anson, The Crown ii Pt. i 91; Temperley, Inner and Outer Cabinet and Privy Council, E.H.R. xxvii 686; ibid n. 10, Professor Temperley says, "Southwell notes one curious little instance of the decline of the Privy Council under James II; 'The Clerk of the Parliament did allways bring the Acts of Parliament to be read in Councill before the King came to the House to pass them: but this was left off in King James 2nd time, the Privy Councill were glad hereof, because it might not seem to lie on them, the advising not to pass any Bill'"; E. R. Turner, op. cit. i 406-407.

[2] Below 473.

[3] E. R. Turner, The Privy Council ii 299; below 468.

[4] E. R. Turner, op. cit. ii 188-201, 264-275.

[5] Ibid 275-276.

[6] Ibid 263, 278-279.

[7] "Actually by the middle of the eighteenth century establishment of particular standing committees of council had entirely come to an end, saving partial exceptions like the committees for Irish bills, which might be regarded either as temporary or as of brief standing. There were now but two standing committees of the council: the committee of foreign affairs or the cabinet—no longer a formally established committee, which men had almost ceased to regard as a council committee—and the committee of the whole privy council," ibid ii 282.

[8] In 1783 Rigby said that, when the duke of Bedford was President of the Council, he was asked to attend "as a third person, otherwise there could not have been a board made," Parlt. Hist. xxiii 873.

[9] E. R. Turner, The Privy Council ii 316-337, 357-366.

[10] Anson, The Crown ii Pt. i 205-207.

[11] Vol. i 516-519.

[12] Anson, The Crown ii Pt. i 215-216.

And, just as in the sixteenth century the Privy Council made use of commissions to perform some of the functions of government, which were staffed by persons who were not privy councillors,[1] so in the three succeeding centuries some of the work of government was entrusted to boards of commissioners. A commission for trade and plantations was appointed in 1672, and revoked in 1675; but it was revived in 1696 as the Board of Trade and Plantations.[2] We shall see that, though at first it did useful work,[3] its functions overlapped the functions of the committee of the Privy Council for Trade and Plantations;[4] and that the functions both of the Board and of the committee of the Privy Council were encroached upon by the secretary of state for the colonies.[5] The board, however, continued to provide lucrative posts for persons whom the government wished to benefit[6]—amongst others to Gibbon. But it did little else. In 1780 Burke gave a description of it, the truth of which Gibbon admitted.[7] He said that the board was

> a sort of temperate bed of influence; a sort of gently ripening hot house, where eight members of Parliament receive salaries of a thousand a year for a certain given time, in order to mature at a proper season, a claim to two thousand, granted for doing less, and on the credit of having toiled so long in that inferior, laborious department.[8]

Of the Board of Works, which was a department of the royal household,[9] Burke said that, between 1770 and 1777, it has cost £400,000, and that its good works were "as carefully concealed as other good works ought to be—they are perfectly invisible."[10] These two boards succumbed to Burke's attack in 1782.[11] Other

[1] Vol. iv 68-69.

[2] Anson, The Crown ii Pt. i 205-206; E. R. Turner, op. cit. ii chap. xxvii

[3] Ibid 345 says, "for some time after it was established it was active, effective, and important; this despite its lack of independent power and its being limited largely to making reports and recommendations to the privy council. Such success resulted from the capacity and diligence of its members. Later on quality of personnel declined, and the board came to be manned largely by inconspicuous office-holders or placemen"; below nn. 7 and 8; vol. xi 71-72.

[4] Ibid 357-358, 259-266; vol. xi 70.

[5] Ibid 346, 358; vol. xi 72.

[6] Above n. 3.

[7] "The fancy of a hostile orator may paint in strong colours of ridicule 'the perpetual virtual adjournment and the unbroken sitting vacation of the board of trade'; but it must be allowed that our duty was not unduly severe, and that I enjoyed many days and weeks of repose without being called away from my library to the office," Autobiographies of Gibbon, Memoir E 320-321.

[8] Speech on Economical Reform, Works (Bohn's ed.) ii 109; of the impression made on the House by this famous speech Gibbon is a witness; he says, "I never can forget the delight with which that diffusive and ingenious orator was heard by both sides of the House, and even by those whose existence he proscribed. The Lords of Trade blushed at their own insignificancy, and Mr. Eden's appeal to the two thousand five hundred volumes of our reports served only to excite a general laugh," Gibbon, Autobiographies, Memoir E 320 n. 43.

[9] Anson, The Crown ii Pt. i 211.

[10] Speech on Economical Reform, Works (Bohn's ed.) ii 89.

[11] 22 George III c. 82.

boards were created by statute in the nineteenth century;[1] but, in the case of the most important of these boards, the board does not meet, and the business is done by the minister at the head of the board and his department.

In fact, in the course of the eighteenth century, the machinery of central government, through which the King exercised his prerogative, was being profoundly modified. The Privy Council had ceased to be governing body of the kingdom, and did only formal and ceremonial business. Its one active committee was the appeal committee, which heard appeals from Jersey and Guernsey and the colonies. The real control of the central government was passing to a committee of the Privy Council composed of the most important of the ministers of state and of the officials of the King's household, which had come to be known as the Cabinet. The cabinet directed the policy of the state; and the actual work of government was done by the departments over which the cabinet ministers presided. Thus the Privy Council was superseded, first by the growth of the cabinet, and, secondly, by the development of many different departments of government. With these two developments of the machinery of the executive government I shall deal in the two following sections.

(2) *The Beginnings of the Cabinet.*[2]

Both according to the law, and according to the modern conventions of the constitution, the cabinet is a body consisting of persons who hold high office in the state. But the view taken by the law of the constitution, and the view taken by the modern conventions of the constitution, as to the relations of this body to the King and Parliament, and as to the manner in which it acts as the executive government of the country, are fundamentally different. According to the law of the constitution the members of the cabinet are the King's servants, appointed by him and dismissible at his pleasure. According to the modern conventions of the constitution the members of the cabinet must be appointed from amongst the leaders of the largest party in the House of Commons, and they continue to hold their offices so long as they can keep a majority in that House. They are the nominees, and, to a large extent, the masters of the largest party in the House of Commons, and only formally the

[1] Anson, The Crown ii Pt. i 205, 214.

[2] Ibid (3rd ed.) Pt. i 76-136; E. I. Carlyle, Clarendon and the Privy Council, E.H.R. xxvii 251; H. W. V. Temperley, Inner and Outer Cabinet and Privy Council ibid 682; Anson, The Cabinet in the Seventeenth and Eighteenth Centuries ibid xxix 56, 325; E. R. Turner, The Development of the Cabinet, Am. Hist. Rev. xviii 751, xix 27: E. R. Turner, The Cabinet Council of England 1622-1784.

King's servants. According to the law of the constitution the cabinet advises the King as to the exercise of his prerogative; and the King, if he decides to act upon this advice, makes his decisions as to the policy to be pursued by the state, and sets in motion the executive machinery by which that policy is to be carried out. According to the conventions of the constitution the cabinet settles the policy of the state, and its individual members, acting either through the prerogative or through statutory powers specially conferred upon them, set in motion the executive machinery by which the policy determined by the cabinet is carried out.

The causes which have led to this modern distinction between the position of the cabinet according to the law and according to the conventions of the constitution, can be traced back to the Revolution of 1688. The Revolution made Parliament the predominant partner in the constitution. It gave Parliament a power, which it had never before continuously and effectively exercised, of scrutinizing and criticizing all the actions of the executive government.[1] It followed that it assumed the power of objecting to ministers whose policy or conduct it disliked, and of compelling the King to dismiss the minister to whom it objected.[2] During the century and a half which followed the Revolution the power of Parliament was tending to increase and the power of the Crown to decrease. Therefore the choice of the members of the cabinet, and the determination of its policy, came to depend less and less on the Crown, and more and more on Parliament. But since this change in the balance of power in the constitution was effected gradually and silently and without any change in the law, it resulted in the modern contrast between position of the cabinet according to the law and according to the conventions of the constitution.

During the greater part of the eighteenth century this change had made comparatively little way.[3] It did not begin to operate quickly till the formed opposition, to which the American war of independence had given rise, gained office in 1782.[4] Up till that time, although it was clear that Parliament could exert great influence on the policy of the state,[5] although it was clear that it could drive from office a minister it disliked and force the Crown to accept a minister it approved,[6] the cabinet held to a large

[1] Vol. vi 254. [2] Above 76; below 636.

[3] Above 457-458; below 641-642.

[4] "It was wittily said by Lord North that our late opposition had often accused him of issuing lying 'Gazettes' but that he had certainly never issued any 'Gazette' which was half so false as that in which his successors announced their installation in office; for it consisted of a long succession of paragraphs, each of them announcing a new Whig appointment and each of them beginning with the words 'His Majesty has been *pleased* to appoint,'" Lecky, History of England v 126.

[5] Above 458. [6] Above 76; below 636.

extent the position ascribed to it by the law of the constitution. To a large extent it was a body of the King's servants, holding office during his pleasure, who advised him as to the policy to be pursued by the state ; [1] for both King and Parliament played their parts in the determination of the policy to be pursued by the state ; and a balance between them was maintained which inclined sometimes in one direction and sometimes in another.[2]

The historian of the cabinet in the eighteenth century has two problems to solve. First, how did this committee of the most important ministers of the Crown supersede the Privy Council as the governing body of the kingdom ? Secondly, to what extent was this committee controlled by the King, and to what extent by Parliament ? With the first problem I must deal at this point, because it relates directly to the machinery through which the King exercised those prerogatives which gave him the control over the executive government of the state. The second problem raises the question of the relations between Parliament and the Crown. Its solution involves an account of the beginnings of the process by which the control of Parliament over the policy of the state was increased and the power of the Crown diminished, and, consequently, the beginnings of the process which will end by giving to the cabinet its unique position in our modern constitution. This problem, therefore, I shall discuss when, having described the position of Parliament in the eighteenth century, I am in a position to deal with the relations between Parliament and the Crown.[3]

We have seen that in the sixteenth century much of the work of the Council had been done by committees permanent or temporary.[4] It is in the earlier part of the seventeenth century that we can see the emergence of a "foreign committee," consisting of some of the leading statesmen of the day, which was assuming responsibility not only for the foreign policy of the state, but also for decisions upon important matters of domestic policy. This committee existed in James I's [5] and Charles I's [6] reigns ; and, since it was coming more and more in Charles I's reign to deal with all matters of importance, domestic as well as foreign, it "was in effect a smaller and more powerful council within the Privy Council itself." [7] It is probable, for instance, that "the ship money scheme was first worked out in the committee of foreign affairs." [8] This committee reappears at the beginning of Charles II's reign.[9] It is true that there is no formal record of its appointment in the Council register.[10] But the fact that such

[1] Below 637, 641. [2] Above 88, 89 ; below 636.
[3] Below 636-643. [4] Vol. iv 67-68 ; above 464.
[5] E. R. Turner, The Cabinet Council i 29-33. [6] Ibid 33-43.
[7] Ibid 41. [8] Ibid 42. [9] Ibid 52. [10] Ibid.

a committee existed, and the fact that it determined all the important matters of foreign and domestic policy, are clearly proved by the acts and statements of its principal member, the earl of Clarendon.[1] In 1668 this committee was reconstituted;[2] and Sir Joseph Williamson, then secretary to the Privy Council, describes it as a committee not only of foreign affairs, but "of the general peace of and temper of the kingdom within."[3] All the evidence which we possess bears out the truth of this description:

> With respect to important domestic matters and questions of policy and state, as in respect of Parliament and religious matters, the committee of foreign affairs, rather than the Privy Council was the body upon which the king relied for assistance and counsel. What should be done for effective management of the House of Commons, whether or not a declaration of indulgence should be issued, these and other such things were matters generally not brought before the Privy Council until the king had made resolutions in the foreign committee.[4]

It was therefore a committee which occupied a status very different from that of the other committees of the Council. This difference in its status is proved by a provision made in 1668 that the rule, that nothing should be referred to any committee until it had been first read at the Council board, should not apply to it.[5] The reason for this provision is obvious. There was a practical certainty that matters read at the Council board would become public property;[6] but it was imperative that, upon many of the important matters which came before this committee, secrecy should be preserved.

The supersession of the Privy Council by this foreign committee was the occasion of attacks in Parliament.[7] In 1679, in order to ward off these attacks, Charles reformed his Privy Council,[8] and promised to "lay aside the use he may have hitherto

[1] In 1667 Clarendon told Parliament that, "as soon as it pleased God to bring His Majesty into England, He established His Privy Council; and shortly, out of them, a Number of Honourable Persons of great Reputation, who for the most Part are still alive, as a Committee for Foreign Affairs, and Consideration of such things as in the Nature of them required much Secrecy," Lords' Journals xii 155, cited Turner, op. cit. i 54-55; this statement is borne out by the notes passed between Charles II and Clarendon at Privy Council meetings, see the citations from these notes, which have been published by the Roxburghe Club, ibid 61; and by notes made by Secretary Nicholas, ibid 56-60.

[2] Ibid 66-67.

[3] Ibid 67; it is described in Brit. Mus. Egerton MS. 2543 fo. 205, cited ibid n. 1 as a committee not only for foreign affairs, but also for "the Corresponding with Justices of the Peace, and other His Ma^ties Officers and Ministers in the severall Countyes of the Kingdome, Concerning the Temper of the Kingdome, etc."

[4] Turner, op. cit. i 86-87.

[5] Ibid 76.

[6] E. R. Turner, The Privy Council i 119-121, 398, 399, 400; ii 56-59.

[7] E. R. Turner, The Cabinet Council i 94-95.

[8] For a full account of this matter see E. R. Turner, The Privy Council i chap. xvi; cp. vol. vi 186.

made of any single Ministry, or private Advices, or forreigne Committees for the Generall Direction of His Affaires." [1] But the new Privy Council, like the old, was too large for the efficient conduct of business which demanded despatch and secrecy. A committee of intelligence was at once formed which, to some extent, took the place of the old committee of foreign affairs.[2] It did not wholly take its place, because it was a committee of the reformed Privy Council which had been forced on Charles by the opposition, and therefore contained some of his opponents.[3] Charles, therefore, never gave it his entire confidence.—" God's fish," he is reported to have said, " they have put a set of men about me, but they shall know nothing." [4] When the crisis was over, and when, after the dissolution of the Oxford Parliament, Charles was once more master in his kingdom,[5] the committee of foreign affairs reappeared, sometimes under that name, sometimes under the names of " the committee " or " the cabinet." [6]

In the third decade of the eighteenth century this body of men, consisting of those who held the great offices of the state, and of other leading statesmen, was generally styled the cabinet.[7] Before that time it had, under that name or under the name of " the committee," taken the place of the Privy Council, and succeeded to its functions as the governing body of the country.[8] The following facts illustrate the position in the state which the cabinet and the Privy Council then occupied : (i) Certain offices were regarded as entitling their holder to a seat in the cabinet. This view was held both by Sunderland and Bolingbroke. In 1701 Sunderland wrote to Somers as follows :

None to be of the cabinet but those who have in some sort a right to be there by their employment. Archbishop, Lord Keeper, Lord President, Lord Privy Seal, Lord Chamberlain, First Lord of the Treasury, and two Secretaries of State. The Lord Lieutenant of Ireland must be there when in England. If the king would have more it shall be the First Commissioner of the Admiralty, and the Master General of his Ordnance.[9]

[1] Cited E. R. Turner, The Cabinet Council i 95. [2] Ibid 96-109.

[3] " During some time the committee of intelligence was attended by Shaftesbury and others strongly opposed to Charles, who entered the council and the committee because they expected to control them. Hence the committee of intelligence was less trusted than the foreign committee before 1679," ibid 109.

[4] John Pollock, The Popish Plot 189, cited vol. vi 186 ; North tells us, Lives of the Norths i 235, that the royalists feared that this reconstitution of the Council meant a surrender by the King to his enemies, but that " his Lordship (Francis North), in a short time, could by his majesty's behaviour amongst them discern his firm purpose not to quit the reins nor to let go the majestracy into the hands of his enemies, as was designed he should."

[5] Vol. vi 188-191. [6] E. R. Turner, The Cabinet Council i 109.

[7] Ibid 144-145. [8] Above 471 ; below 474.

[9] Cited Anson, The Crown ii Pt. i 98.

In 1710 Bolingbroke wrote to Strafford that

> the employment of First Commissioner of the Admiralty brings your lordship into the cabinet which would not have been if the other employment (Master of the Ordnance) had fallen to your share, without making a precedent for enlarging the cabinet, which her majesty had much rather confine than extend.[1]

(ii) The members of the cabinet considered that they were entitled to be consulted when important decisions were taken. In 1694 Lord Normanby had been made a member of the cabinet without office. He complained because he was not summoned to a meeting of ministers; nor was he wholly satisfied by the King's explanation that this meeting was not a cabinet council.[2] We shall see that this explanation seems to indicate a distinction between an inner and outer ring of cabinet councillors;[3] and that it throws some light upon the relation between the King, his ministers, and his cabinet, which existed during this century.[4] At this point it is sufficient to note that it illustrates the position which the cabinet was taking in the state. (iii) The fact that the Privy Council was coming to be regarded as a body which merely gave formal sanction to the decisions taken by the cabinet, was becoming apparent as early as James II's reign. We have seen that Acts of Parliament had then ceased to be read at the Council before the King assented to them;[5] and that as early as 1668 matters to be brought before the foreign committee were exempt from the rule that nothing should be referred to a committee of Council till it had first been read at the Council board.[6] That, at the end of Anne's reign, the sanction of the Council had come to be merely formal, is shown by the following episode:

> When the treaties of peace and commerce were laid before the Privy Council in 1713, and the queen proposed their ratification, Lord Cholmondeley suggested a postponement for further consideration, but he was told that the time for exchanging ratifications was settled, and was so near at hand that no postponement was possible. The treaties thereupon passed the Council, and the next day Lord Cholmondeley was deprived of his places in the queen's household.[7]

We shall see that the celebrated meeting of the Privy Council, held when Anne was dying, at which Shrewsbury was made

[1] Cited Anson, The Crown ii Pt. i 105-106; similarly Shrewsbury, writing to Harley, said that he ought to be at the head of the Treasury "because you then come naturally into the Cabinet Council," ibid 106.

[2] Ibid 85; Turner, The Cabinet Council i 283-286. [3] Below 479-480.

[4] Below 638. [5] Above 466 n. 1. [6] Above 471.

[7] Anson, The Crown ii Pt. i 107; there is some point in Peterborough's epigram in a debate in the House of Lords in 1711, that "the Privy Councillors were such as were thought to know everything, and knew nothing: and those of the Cabinet Council thought nobody knew anything but themselves," Parlt. Hist. vi 974.

Lord Treasurer and the Hanoverian succession was secured,[1] is probably not (as has sometimes been said) [2] a belated and the last instance of the resumption by the Privy Council of its powers.

The fact that this body, sometimes styled "the committee," and later more generally styled "the cabinet," is really the same body as in former days went by the name of "the foreign committee," has I think been proved by Professor E. R. Turner.[3] In William III and Anne's reign the terms "the committee" or the "lords of the committee" were more frequently used: after George I's reign the term "cabinet." [4] But both in the earlier and the later period all these terms were used to mean the same body. Thus in 1690 Mary, who had been left to act as regent during the absence of William, said in her diary that William had "made choice of 9 persons who should sit as a committee during his absence," and elsewhere she speaks of this committee as "my cabinet council." [5] In 1741 and 1747 the cabinet is referred to as the lords of the committee of council for foreign affairs; [6] and in 1748 Lord Hardwicke said that the cabinet was the committee of council for foreign affairs.[7] In 1768 a cabinet was described as "a meeting of the committee of the king's servants"; [8] and there are other later instances in which cabinets were so described.[9] No doubt the use of the term "committee" has caused confusion, because the term "the committee" is sometimes used to refer to the committee of the whole Council, or to some particular committee of the Council, so that it is necessary to look at the context to see in what sense the word is being used in any particular case.[10] Moreover, there may have been some tendency in Anne's reign to apply the term "committee" to meetings at which the Queen was not present, and the term "cabinet" to meetings at which she was present; [11] but "all in all, it would seem that in the period of William and

[1] Above 50.

[2] Anson, The Crown ii Pt. i 107-108; cp. Lecky, History of England i 204-206; Trevelyan, England under Queen Anne iii 303; below 476.

[3] For Professor Turner's elaborate discussion of the many conflicting views which have been held by English and foreign historians on this matter see The Cabinet Council i chap. xiv.

[4] Ibid 144-145, 386-388. [5] Ibid 154-155. [6] Ibid 123-124.

[7] Writing to Newcastle to explain why he did not think it necessary to submit the Treaty of Aix-la-Chapelle to the Privy Council, he said, "for my own part I am thoroughly satisfied, especially since all the Lords of the Cabinet, which is the Committee of Council for foreign Affairs are of the Regency, and eleven of them were present, when the Treaty, and the separate and secret Articles were considered, and gave an unreserved Approbation," ibid 393.

[8] Ibid 391. [9] Ibid 391-392. [10] Ibid 150-151.

[11] Ibid 385-387; Professor Turner says, ibid at p. 386, "if it be possible to establish such a rule at this time it must be remembered that there continues to be numerous instances that constitute exceptions. Prince George, when regent for George I, was certainly present at 'the committee,' as was Queen Caroline afterwards when she acted as regent for George II."

afterwards in the time of Anne there was generally no distinction implied by the terms 'committee of council' or 'lords of the committee'—when used obviously to designate a meeting of the principal ministers—and 'cabinet council.'" [1] Before the succession to the throne of the house of Hanover, such terms as "cabinet," "junto," or "cabal" were popular names given to a body which was more formally known as the committee of foreign affairs or the committee: [2] after the succession to the throne of the house of Hanover, "the term cabinet was definitely affixed both in official nomenclature and popular usage to meetings of the principal ministers, though they were meeting apart from the king." [3] Consequently, the term committee was generally, though not invariably, used to mean the ordinary committee or committees of the Privy Council.

A very large part of the obscurity which has shrouded the emergence of the cabinet as the governing body of the kingdom, would seem, at first sight, to be caused mainly by difficulties in terminology. That is in a sense true; [4] but an examination of the reasons for these terminological difficulties will show us that they are caused by changes in the use of words which were not merely capricious, but were, on the contrary, due to substantial causes, which throw a considerable light on the growth of the cabinet.

In the first place, the late seventeenth and early eighteenth centuries were an age of transition—of transition from the period when the executive government of the state was vested in the King and his Privy Council, to the period when it was vested in the King and his cabinet. The absence of precision in terminology is an index to the absence of precision in the nature of the body which is assuming the control over the government. At the present day there is no doubt that it is misleading to describe the cabinet as a committee of the Privy Council; for it is "a body distinct from the Privy Council in title, in function, and in mode of summons." [5] But, though, in the eighteenth century, the growth of the distinction between the cabinet and other committees of the Council, tended more and more to make it misleading to describe the cabinet simply as a committee of the Council, there is no doubt that, in its origin, it was simply the most important committee of the Council; [6] and we shall

[1] E. R. Turner, The Cabinet Council i 384.
[2] Ibid 386. [3] Ibid 387.
[4] This fact is illustrated by the debate in the House of Lords in 1711 on the meaning to be attached to the words "ministry" and "cabinet," Parlt. Hist. vi 971-975.
[5] Anson, The Crown ii Pt. i 110.
[6] "That the cabinet continued in theory to be a committee of the privy council was often forgotten now that the cabinet had become in fact a small interior council, and was no longer referred to as 'the committee.' That it was a committee of the

see that its attainment of so distinct a status, that it is now misleading to describe it as a committee of the Privy Council, was due to changes in its relations to the King and Parliament which took place in the course of the eighteenth and nineteenth centuries.[1] In 1714 and later it was regarded as a committee of the Privy Council; and therefore it is only natural that it is sometimes difficult to say whether a given meeting described as a meeting of "the committee," is a meeting of a committee of the Council or a meeting of the cabinet.[2] And the difficulty is made the greater by the fact that a meeting, styled a meeting of "the committee" or "the cabinet," sometimes acted as a committee of the whole Council, and sometimes turned itself into a meeting of the Council, or, acting as a meeting of the Council, gave formal sanction to the decisions which it had made when sitting as "the committee" or the cabinet.[3] "Not only did the cabinet or 'committee,' when it pleased, act as a committee of the whole Privy Council, and even turn itself into a Privy Council, but from time to time occurs evidence that the cabinet was regarded technically as a committee of the Council, after the term 'committee of foreign affairs' disappears."[4] It may well be that on July 30 1714, when the Queen was dying, the Queen's ministers were holding, not a meeting of "the committee" or the cabinet, but a meeting of the Privy Council; and that the dukes of Argyle and Shrewsbury attended, as they had a right to attend, in their capacity of privy councillors. If this view of a matter is correct the incident cannot be regarded as the last case in which the Privy Council asserted, as against the cabinet, its ancient rights to control the government of the country, but simply as a case in which the Queen's ministers, acting as a Privy Council, were reinforced by the presence, perhaps without a summons, of two other leading privy councillors.[5]

council was sometimes questioned, and actually no such standing committee of the privy council had been appointed since the establishment of the committee of intelligence in 1679. Yet the cabinet was composed only of those who were of the privy council, the legal status of cabinet councillors was that they were privy councillors, and what they advised or what they resolved did not issue in a public order unless ordered in the privy council," Turner, The Cabinet Council i 389; in 1770 Rigby said, "the cabinet is well known to consist of a committee, or a few members of the privy council called together for particular purposes; it is not pretended to have any constitutional authority, but it does not therefore follow, that it may not deliberate upon measures to be referred to the privy council that has," Parlt. Hist. xvi 837.

[1] Below 642-643. [2] Above 474.

[3] Prof. Turner gives an instance of this in April 1696, ibid i 151-152, 171—"on the whole it is probable that the group of principal ministers of the king, sometimes called cabinet council and at others 'the committee,' was here considering itself as a committee of the whole council, or afterwards so considering itself, as turning itself into a privy council for formal sanctioning of business with respect to which it had made its decisions." [4] Ibid 390.

[5] Above 473-474; Prof. Temperley says, Camb. Mod. Hist. v 476, "the Privy Council, which was sitting at Whitehall, adjourned to Kensington to discuss the

In the second place, this transition from government by the Privy Council to government by a few leading ministers and statesmen who were in the King's confidence, aroused the opposition of Parliament. Clarendon represented the ideas held on this point by the Parliamentary statesmen of the seventeenth century;[1] and we have seen that, though his practice as Charles II's Chancellor was otherwise,[2] he regarded the Privy Council as the body through whom the King should conduct his government. It is for this reason that the inner ring, which was displacing the Privy Council, was called by various names, meant in many cases to convey an opprobrious signification. The word "cabinet" was often used in the sense of a small private room.[3] The King's cabinet was naturally the place where this inner ring would meet.[4] In 1642 the House of Commons assigned as the cause of the constitutional troubles "the managing and transacting the great affairs of the realm in private cabinet councils."[5] In Charles II's reign the terms "cabinet" and "cabinet council" were habitually used to express the inner ring of the King's ministers. Thus Halifax, in his "Character of Charles II," said of the duchess of Portsmouth that "her chamber was the true cabinet council."[6] It is clear, however, from the description of Roger North, that the word had come to be used, at the end of Charles II's reign, without any opprobrious signification, to signify the real governing body of the kingdom.[7] Another word

situation. Upon this meeting the dukes of Argyle and Somerset are supposed to have broken, though unsummoned. But Argyle had attended the Council as recently as May, and Somerset, whose duchess was at the bedside of Anne, may have received a summons at her suggestion. Whatever be the explanation, the Privy Council Register shows that they did attend, though it does not show that their presence caused the scale to turn against Bolingbroke"; the entry in the Privy Council Register is: "their Lordships met in the Council Chamber and, considering the present exigency of affairs, were unanimously of opinion to move the Queen that she would constitute the duke of Shrewsbury Lord Treasurer," Camb. Mod. Hist. v 476.

[1] Above 465. [2] Above 471.

[3] For an elaborate account of the evolution of the meaning of the word see Turner, The Cabinet Council i 214-242; in origin a French word, it had become naturalized in England in the sixteenth and seventeenth centuries, and was used to signify a small or private room.

[4] At the beginning of the seventeenth century Francis Bacon in his essay "Of Counsel" used the term "cabinet council" to mean a small council of royal favourites, see the passage cited by Turner, The Cabinet Council i 219 from Harl. MS. 5106 f. 21.

[5] Turner, op. cit. i 229. [6] Foxcroft, Life of Halifax ii 350.

[7] He tells us, Lives of the Norths i 299, that the cabinet "consisted of those few great officers and courtiers whom the king relied upon for the interior dispatch of his affairs"; he points out that it was derived from the Privy Council; but that "assemblies at first reasonably constituted of a due number and temper for dispatch of affairs committed to them, by improvident increase came to be formal and troublesome. . . . Whereupon it is found easier and safer to substitute than to dissolve"; for that reason "the cabinet council, which at first was but in the nature of a private conversation, came to be a formal council and had the direction of most of the transactions of the Government, foreign and domestic"; that this was not

used to describe the body was "Cabal"—a word derived ultimately from a Hebrew word meaning mystic doctrine.[1] In 1679 the House of Commons blamed the cabinet for the disagreements between King and Parliament, and defined it as "a caball not established by law."[2] Similarly, a writer of 1701 said that it was "an innovation by evil ministers, that war and peace, and matters of the highest consequences, should be finally concluded in a *secret cabal*, and only pass through the *Privy Council* for form's sake, as a conduit pipe, to convey those resolutions with authority to the people."[3] Another word, borrowed from Spain, and used in a similar way was "junto." In Charles I's reign the foreign committee was called by this name.[4] In William III and Anne's reign, it was used to mean the leading statesmen of the Whig party.[5]

All these different terms were applied to the new body which was superseding the Privy Council as the governing body of the kingdom, and all at first were used in an opprobrious sense by the Parliamentary opposition which disliked this development, because it made it difficult to fix upon the King's ministers legal responsibility for the consequences of their acts. This dislike was expressed both before[6] and after the Revolution;[7] and we have seen that the views of the Parliamentary statesmen, who took this view, were embodied in the clause of the Act of Settlement, which aimed at restoring the Privy Council to its old position.[8] But we have seen that it was recognized in Anne's reign that the post-revolution constitution could not be worked on these lines, and that this clause was repealed before it became

only sound history, but also fairly represented the position at the end of Charles II's reign is clear from Francis North's own statement as to his attendance at cabinet meetings, see Turner, The Cabinet Council i 235, 347, citing Add. MS. 32520 f. 251.

[1] Turner, op. cit. i 243 points out that the view that the word had its origin in the initial letters of Clifford, Ashley, Buckingham, Arlington and Lauderdale was "an error into which earlier writers had not fallen. The word was no more than a derivation of the Hebrew *gabbalah*—mystic doctrine or secret lore. Like *cabinet* it probably came over from French into English usage, about the beginning of the seventeenth century, to describe a small group acting in secret, and then a small secret council."

[2] Ibid 234.

[3] Cited ibid 240; the passage is cited from "A Vindication of the Rights of the Commons of England," by Sir Humphrey Mackworth, at p. 16.

[4] Turner, op. cit. i 246-247.

[5] The word is often used in this sense by Swift in "The Examiner" (Works ed. 1768 vol. iii), see e.g. no. 29—"Thus the union of the two kingdoms improved that between the ministry and the junto . . . but however was not quite perfected till Prince George's death"; no. 46—"When, instead of an *indulgent lawful* Queen, we must have referred to a lawless *Junto*, and to an *arbitrary captain-general*"; see also nos. 25, 47.

[6] Turner, The Cabinet Council i 234, 340-341.

[7] This is proved by debates in 1692, Parlt. Hist. v 731; in 1711, ibid vi 970-981; and in 1753, E.H.R. xxvii 691-692.

[8] Vol. vi 260-262; 12, 13 William III c. 2 § 3.

operative.[1] The constitutional developments of the last half-century had made it plain that the executive government must be vested in a small body of leading statesmen, who could work together. Some word was wanted to express this body, and to distinguish it from the Privy Council and the ordinary committees of the Privy Council. The word adopted was "cabinet" mainly because it had been the word most generally used before the Revolution, and because it had freed itself from its original association with the King's private room, and had acquired the meaning of a small council.

Both the confused terminology of the late seventeenth and early eighteenth centuries, and the more settled terminology which prevailed from George I's reign onwards, throw much light upon the process by which, and the conditions under which, this small committee superseded the Privy Council as the governing body of the kingdom. By 1714 this supersession had taken place. It was recognized on all hands that this committee of privy councillors, consisting of persons who held high office in the state, the church, or in the king's household, had superseded the Privy Council as the governing body of the kingdom;[2] and it was recognized on all hands that a member or the members of this committee could not continue to hold office, if the House of Commons definitely objected to him or them.[3] But though the constitution of the cabinet seems to have taken what was destined to be its modern form in the reigns of Anne and George I,[4] that form was not as yet finally settled. In George II's reign a distinction had grown up between the efficient and titular cabinet—a distinction of which we may perhaps see the germ in William III's reign.[5] Lords Hardwicke and Hervey tell us that in 1737 the cabinet consisted of sixteen, and that in 1740 it consisted of fourteen members. But "both Lord Hardwicke and Lord Hervey . . . describe a smaller group—Walpole, the two Secretaries of State and the Chancellor—meeting for the discussion and virtual settlement of policy. The formality,

[1] 4 Anne c. 8 § 24; vol. vi 242 and n. 2. [2] Above 472-473.

[3] Swift said in "An Inquiry into the Behaviour of the Queen's last Ministry," Works (ed. 1768) xii 86, "I suppose it need not be added, that the government of England cannot move a step, while the House of Commons continues to dislike proceedings, or persons employed, at least in an age when Parliaments are grown so frequent, and are made so necessary."

[4] Below 639-640.

[5] When Lord Normanby complained that he had not been summoned to meetings of the cabinet, above 473, William wrote, "it is true that I did promise my lord Normanby, that when there was a cabinet council, he should assist at it; but surely this does not engage either the queen or myself, to summon him to all the meetings, which we may order, on particular occasions, to be attended solely by the great officers of the crown, namely, the lord keeper, the lord president, the lord privy seal, and the two secretaries of state," cited Turner, The Cabinet Council i 285.

amounting to futility, of the meetings of the whole Cabinet Council is apparent in these memoirs." [1]

This distinction between the efficient and titular members of the cabinet was well recognized in George II's and the earlier part of George III's reigns.[2] In 1775 the duke of Richmond said in the debate on the address, " I need not tell his lordship, but I shall take the liberty to inform the House, that the correspondence with our foreign ministers, at a convenient time, is sent round in little blue boxes to the efficient cabinet ministers "; [3] in the same debate Lord Mansfield distinguished between the periods when he was a nominal and an efficient cabinet minister ; [4] and Shelburne told Bentham that the cabinet consisted of an outer circle, and of an inner circle to whom the important state papers were communicated.[5] This was a development which materially assisted the project of George III to make himself really a King. Ministers who had resigned and had gone into opposition, though they had ceased to belong to the inner circle of the cabinet, were still considered to be members of the outer circle,[6] and might still be consulted by the King.[7] On the other hand, it enabled members of the cabinet to disclaim responsibility for measures of which they did not approve.[8] It was not

[1] Anson, The Crown (4th ed.) ii Pt. i 112.

[2] In 1734 Lord Scarborough resigned his Mastership of the Horse but kept his regiment and remained a cabinet councillor, Hervey, Memoirs i 293 ; in 1765 Pitt, while rejecting the idea that Lord Lyttleton should be President of the Council, suggested that he might be made " a nominal cabinet councillor," Fortescue, Papers of George III i 177 : in 1775 the King talked of " the effective cabinet," ibid iii 279.

[3] Parlt. Hist. xviii 278.

[4] " Surely they will permit me to repeat again, that I have been a nominal cabinet minister part of the last reign, and the whole of the present ; that I was an efficient cabinet minister during part of both periods ; but that since the time before alluded to in this debate, I have had no concern or participation whatever in his Majesty's councils," ibid xviii 279.

[5] Shelburne, he says told him that there were " three grades of power " : " the *Cabinet* simply ; the Cabinet with the *circulation ;* and the Cabinet with the circulation and the *Post Office*. By the *circulation* was meant the privilege of a key to the box, in which the foreign despatches, with or without other documents of the day, went its rounds : by the *Post Office*, the power of ordering the letters of individuals to be opened at the Post Office. Such is the information given by that minister to the Author of these pages when present at the opening of one of these receptacles, and reading of the contents," Works ix 218 n.

[6] Anson, The Crown ii Pt. i 112-113.

[7] In 1771 George III approved of the proposition that the duke of Grafton should be Lord Privy Seal, but not of the " confidential cabinet," so that he would not be summoned on ministerial questions " except when they regard some affair to be debated in the House of Lords ; on other occasions if his advice is asked he will undoubtedly give it privately," Fortescue Papers of George III ii 255.

[8] Camden, who had been Chancellor in the duke of Grafton's ministry, said that he did not approve of the action of his colleagues in relation to Wilkes and the Middlesex election, Anson, The Crown ii Pt. i 117 ; in 1775 both he and the duke of Grafton disclaimed any responsibility for the imposition of taxes on America, Parlt. Hist. xviii 272, 274 ; the view of the duke of Grafton was that only those cabinet ministers who approved a measure were responsible for it—" every cabinet

till the victory of the Americans had given power to the formed opposition to George III's policy, that a return began to be made to the rule put forward by Sunderland in 1701,[1] that only the holders of responsible offices should be members of the cabinet.[2] But by that time there had been a change in men's ideas as to the nature of the responsible offices which qualified their holders for a seat in the cabinet. The Archbishop of Canterbury had disappeared, and such officials of the royal household as the Lord Chamberlain and the Master of the Horse.[3] The rule that these officials of the royal household changed with a change of ministry, was the sole reminiscence of the more important position which they occupied during the greater part of the eighteenth century.[4] The cabinet was now composed, for the most part, of the heads of the great departments of state ;[5] and this change foreshadows the great changes in the position of the cabinet which, at the end of the eighteenth and the beginning of the nineteenth centuries, will give it the position in the state which it occupies to-day.

The main interest in the history of the cabinet after 1714 is the evolution of the process by which its relations to the House of Lords, the House of Commons, and the King were adjusted ;[6] and, quite at the end of the century, the beginnings of the process by which this committee of the King's servants became the nominees of the majority in the House of Commons, and partly the servants and partly the masters of that majority.[7] With these aspects of the history of the cabinet I shall deal when I come to discuss the relations of the executive government to Parliament. At this point we must examine the machinery through which the cabinet acted.

(3) *The chief officials of the state and royal household, and their departments.*

The members of that inner ring of the Council which, under the names of "foreign committee," "the committee," or "the cabinet," superseded the Council as the governing body of the state, always comprised some of the most important officials of the state, the church, and the royal household ; and it was these officials who were the most frequently placed on many of the other committees of the Council which were appointed in the

minister who acted and deliberated in that capacity at the time of passing that law, should equally share the censure, if it was a bad one, or be entitled to an equal claim of merit, if it was a good one."

[1] Above 472.
[2] Below 642-643.
[3] Anson, The Crown ii Pt. i 129.
[4] Above 462.
[5] Anson, The Crown ii Pt. i 129.
[6] Below 636-643.
[7] Below 643, 723.

seventeenth century.[1] As Professor Turner has pointed out, this "concentration of committee work in the hands of a few of the prominent and active members" of the Council, led to the supersession of the Council as an active governing body, partly by a committee of the whole Council, and chiefly by that committee which developed into the cabinet.[2] These officials fell into three main categories. First, there were the heads of the principal departments of state—the law, the army and navy, the revenue, home and foreign affairs; secondly, the archbishops who represented the church, which Henry VIII and Elizabeth had made a very integral part of the state; and thirdly, the chief officials of the King's household. We have seen that it was not till after 1782 that membership of the cabinet was restricted to officials of the first class.[3]

The principal departments of state had long lost their former intimate connection with the King's household;[4] and their heads had become the chief ministers of the state. But one important link between them and the King's household remained. Both the officials of the state and the officials of the King's household were paid in the eighteenth century, as they were paid in the twelfth century, by the King. In fact, this connection between the King and his household on the one hand, and the departments of state on the other, had been perpetuated by the financial arrangements made by Parliament after the Revolution. We have seen that in 1689 Parliament had voted William and Mary a fixed income of £700,000 a year, on which the expenses of the royal household, the salaries of ministers abroad and the judges, the secret service, pensions, and the salaries of all the civil servants were charged.[5] This list of charges upon this fixed income was known as the Civil List. The income was derived in part from the hereditary revenues of the Crown which were estimated to produce about £400,000, and in part from the excise duties which were estimated to produce about £300,000

[1] "In 1634 when there were probably five standing committees of the council Laud, Archbishop of Canterbury, was on four of them, and next year he was made a treasury commissioner as well. The two secretaries of state were on all five committees. Two years later the lord treasurer was on all six of the standing committees of which record is extant, the two secretaries and two other councillors were on five committees, and the Archbishop of Canterbury on four. During the years 1660 to 1664 some fifty-four committees of the council, temporary and standing, were appointed. Of forty-three of these committees both secretaries of state were members, while one or other of the secretaries was on seven more," E. R. Turner, The Cabinet Council i 16-17; for further details see E. R. Turner, The Privy Council ii 220-227, 265-274.

[2] Ibid 227. [3] Above 481. [4] Above 459-460.

[5] Vol. vi 252-253; Anson, The Crown ii Pt. ii 195; the amounts paid from the civil list were not the whole of the remuneration received by many of these servants; many of them were paid in part, and some almost wholly by fees; see vol. i 254-255, 256, 424 for the fees paid to the judges and officers of the courts, and below for the fees paid to civil servants.

a year.[1] Of the history of the civil list during the eighteenth century it is necessary to say a few words at this point, because it has an important bearing upon some of the salient characteristics of the machinery of the central government; and because, as we shall see later, it has also a bearing upon the relations between King and Parliament, and therefore upon the maintenance of the balance of power as between the different parts of the eighteenth-century constitution.[2]

The precedent set by Parliament in 1689 was followed all through the eighteenth century. The civil lists of Anne and George I were settled in the same way as the civil list of William and Mary, and at the same amount; and, as in the earlier period, the amount so fixed was the King's property to dispose of as he pleased.[3] But Anne incurred debts amounting to £1,200,000, and George I incurred debts amounting to £1,000,000, all of which were discharged by loans secured on the civil list. Parliament guaranteed George II a sum of £800,000 a year for his civil list, and promised that, if the hereditary revenues failed to produce that sum, it would make up the deficiency. If they produced more he was entitled to keep the surplus. Under George III a new plan was adopted. The King gave up his hereditary revenues in return for a fixed sum of £800,000 a year.[4] That did not mean that his total revenue was limited to £800,000 a year. Like his predecessors, he had in addition other sources of revenue. He had the droits of the Crown and the admiralty, the revenues of Scotland, the Irish civil list, and the revenues of the duchies of Cornwall and Lancaster.[5] These sources of income brought the annual revenue of the Crown up to something in the region of £1,000,000.[6] But all and more than all of this revenue was absorbed by the expenses which the King's policy of

[1] Vol. vi 252-253: for details of the produce of these revenues and the amounts available thereout for the civil list see Anson, The Crown ii Pt. ii 195-196.

[2] For the history of the civil list see Report on Public Income and Expenditure, Parlt. Papers 1868-1869 xxxv Pt. ii App. 13 pp. 585 seqq.; Erskine May, Constitutional History i 232-249; Anson, The Crown ii Pt. ii 195-198: Maitland, Constitutional History 435-438; Calendar of Treasury Papers 1742-1745 xxxix-xlvii; for the heads of expense charged on the civil list in 1699 see Parlt. Papers 1868-1869 xxxv Pt. ii App. 13 pp. 586-593; for the heads of the expenses in 1742-1745 see Calendar of Treasury Books and Papers xl-xli.

[3] Ibid 1742-1745 xxxix.

[4] The money arising from the hereditary revenues was carried to "the aggregate fund," out of which £723,000 was granted annually to the King during the continuance of the existing annuities to the Princess dowager of Wales, the duke of Cumberland, and Princess Amelia. As those charges ceased the amount was increased up to £800,000. Thus George III "accepted the *minimum* civil list of his predecessors, and relinquished all claim to the surplus," Erskine May, op. cit. i 234-235.

[5] Ibid 235; the King was entitled to the revenues of the duchy of Cornwall till the Prince of Wales came of age, ibid i 248-249; above 452-453.

[6] This was Burke's estimate, Thoughts on the Cause of the Present Discontents, Works (Bohn's ed.) 243.

increasing the influence of the Crown entailed. In 1769 and 1771 Parliament was asked to discharge large arrears of payments, and at the latter date to increase the civil list to £900,000 a year. It was sufficiently clear that the cause of these debts was not the personal extravagance of the King—he lived most parsimoniously and even meanly ;[1] but that it was the pursuance of his design to make himself King by creating a party of the King's friends. Therefore the first attempts at reform were made by the new Whig party led by Rockingham, Fox, Burke, and Shelburne, which came into power after the close of the American war of independence. That party wished to reform the machinery of the departments of state and of the royal household, partly in the interests of economy, but mainly in order to reduce the King's influence.[2] The large scheme of economic reform which Burke proposed in 1780 was defeated ; but in 1782 Rockingham's ministry carried a measure of economic reform, which affected a considerable saving of public money.[3] " But debt continued to be the normal condition of the civil list throughout the reign of George III "[4]—a debt, however, which was more than covered by the surplus of the hereditary revenues which George III had surrendered.[5]

George IV's civil list was settled upon principles similar to that of George III. But in George III's reign the distinction between the personal expenses of the King and the royal household, and the expenses of the state, had emerged in the debates upon Burke's proposals for economic reform ;[6] and, as a

[1] As Burke said in 1770, Works (Bohn's ed.) i 343, " the generality of people do feel a good deal mortified when they compare the wants of the court with its expenses. They do not behold the cause of this distress in any part of the apparatus of royal magnificence. In all this, they see nothing but the operations of parsimony, attended with all the consequences of profusion."

[2] In 1780 Burke stated that the reform of the treasury of the chamber, that is of the financial department of the household, was " the pith and marrow of his plan," Parlt. Hist. xxi 304 ; in the same year Dunning asked for an account of all monies paid from the civil list or any other part of the public revenue by way of pension, salary or otherwise to members of Parliament, ibid xxi 376, and proposed that certain offices in the household should be incompatible with a seat in Parliament, ibid xxi 379 ; in 1781 Burke, in proposing his bill for the regulation of the civil list establishments, said that the bill would save the public £200,000 a year, but " what he valued more than all this saving was the destruction of an undue influence over the minds of sixty members of Parliament in both Houses," ibid xxi 1227.

[3] Below 522. [4] Erskine May, op. cit. i 242.

[5] Ibid 243 ; during the years 1760-1830 the revenues surrendered by the Crown amounted to the sum of £94,871,427 19s. 9¾d. ; and the annual sum settled upon the Crown plus the grants to discharge civil list debts amounted to the sum of £65,823,438 7s. 11½d., Parlt. Papers 1831-1832 xxvii 769.

[6] In 1780 Burke " reprobated in the strongest terms the doctrine that there was no difference between the King's property in the civil list and private property. The King was only a trustee for the public," Parlt. Hist. xxi 204 ; Fox made a similar statement, ibid xxi 210 ; Sir Fletcher Norton said that there was " a distinction between that part of the civil list appropriated to the special purposes of government, and that other part applicable to the expenses or maintenance of the

consequence of this distinction, it became possible to contend that Parliament was entitled to control the manner in which the civil list was expended—a contention which was naturally denied by George III.[1] In the following century this distinction was followed in the arrangements made for settling the civil list. Some of the state expenses were removed from the civil list in 1816;[2] and this process was carried much further in the reigns of William IV[3] and Victoria,[4] with the result that in Victoria's reign, the civil list was restricted to the expenses of the Queen and the royal household. Moreover, since William IV's reign, the Crown has surrendered all additional sources of revenue, except the revenue derived from the duchies of Lancaster and Cornwall, in return for a fixed income[5]—"practically we have come to have a King with a salary."[6] The personal expenses of the King and the royal household have at last been separated from the expenses of the state, and, as a result, it has been possible and necessary to distinguish between the King's private property and the property of the state.[7]

This history of the evolution of the civil list is the financial parallel of the history of the evolution of the cabinet. Just as the expenses, and therefore the patronage, of the state were more and more withdrawn from the civil list, and therefore from the control of the King, and more and more placed under the control of the House of Commons, so the members of the cabinet more and more ceased to be in any real sense the nominees of the King, and came to be the nominees of the dominant party in the House of Commons. And just as this stage in the evolution of the cabinet had only just begun at the end of the eighteenth century, so the process of removing from the civil list, and therefore from the control of the King, the expenses and patronage of the state, was then only in its initial stages. We must now examine the manner in which the system adopted by Parliament for the settlement of the civil list directly determined the outstanding characteristics of the machinery of central government during the eighteenth century, and indirectly affected them for a considerably longer period. I shall deal with this subject under

king's household. The former he thought directly and immediately within the control of Parliament. . . . The latter . . . bore as near a relation as possible in its nature to private property," Parlt. Hist. xxi 262; Governor Pownall claimed to be "the first who had made the distinction between that part of the civil list, which went to the offices of state, and that part which went to the King's household," ibid 302.

[1] Keir, Economical Reform, L.Q.R. l 378-380.

[2] 56 George III c. 46; Anson, The Crown ii Pt. ii 197.

[3] 1 William IV c. 25; 2, 3 William IV c. 116.

[4] 1, 2 Victoria c. 2.

[5] Erskine May, op. cit. i 245, 246-247.

[6] Maitland, Constitutional History 437.

[7] 39, 40 George III c. 88; 4 George IV c. 18; 25, 26 Victoria c. 37; Erskine May, op. cit. i 249.

two main heads: first the outstanding characteristics of the machinery of central government; and, secondly, the beginnings of reform.

(i) *The outstanding characteristics of the machinery of central government.*

It is clear that the plan adopted by Parliament of voting to the Crown an annual sum of money, out of which the Crown paid the expenses of his household and the salaries of the civil servants of the state, tended to preserve the old idea that all the officials of the central government were in substance as well as in form the King's servants, and to perpetuate the old connection between the servants of the King's court and household and the servants of the state. All these officials, and many of their subordinates employed in the departments of government over which these officials presided, continued to be in a very real sense the servants of the King;[1] for his prerogative was the source of the greater part of their powers,[2] most of them held their offices at his pleasure,[3] and his purse was, to a greater or a less extent,[4] the source of their remuneration. These facts are the causes of some of the outstanding characteristics of the machinery of central government in the eighteenth century.

In the first place, it was a flexible machinery. In this century, as in preceding centuries, it could easily be adapted to meet new needs. At the King's discretion, new officials and new departments could be created, and the functions of old officials and old departments could be expanded. In some cases, it is true, new officials or boards were created by statute;[5] but in many cases the process was a process of gradual and natural expansion. The King created new officials when they were wanted to meet new needs, and the staffs of their departments were increased in accordance with the exigencies of business.[6] In the second place this machinery was remarkable for the continuity of its development from very early periods in its history, and for the continued existence of many survivals, both in organization and ideas, from these early periods. It was therefore remarkable for many anomalies in its constitution and for many complexities in its organization, and, consequently, for much inefficiency. In the third place, as the result of these characteristics, this machinery gave to the chief officials of the state and to their departments a considerable measure of

[1] Calendar of Treasury Books and Papers 1742-1745 xxxix.

[2] Above 453-455; below 637.

[3] For exceptional cases such as the hereditary offices, and the offices held for life or lives, see above 461; below 501.

[4] Below 500 n. 3, 512. [5] Below 490-491. [6] Below 496-498.

autonomy. Subject to the legal control of the King and the courts, and subject to the political control of Parliament, they were able to increase their powers as they pleased without external interference. We must now examine some of the concrete results of these characteristics. We shall see that their combined working had produced a system which stood in urgent need of a very thorough reform.

The flexibility of this machinery.

We have seen that many of the leading officials, who were at the head of such older departments of the state as the law, the revenue, and the army and the navy, were originally officials of the King's court and household; that they had ceased to be attached to the court and household; and that they had become officials of the state at the head of the great departments of the executive government.[1] Those departments had in many cases been divided and subdivided; and new departments had been created by statute. At the same time the King's court and household had continued to be organized upon very much the same plan as that upon which it had been organized in the fifteenth and sixteenth centuries. Let us glance at one or two illustrations taken from the history of these older departments of government.

I need not say anything about the *Law* since I have sketched the history of the judicial system in the first volume of this History. We have seen that by a series of gradual developments, assisted to some extent by the Legislature, the courts and the offices of the courts had, before the beginning of the eighteenth century, taken the shape which they retained down to the reforms of the nineteenth century. We shall see that many of the characteristic features in their organization are present in many of the departments of the civil service.

By the beginning of the eighteenth century there were very many officials and departments which were concerned with the *Revenue*.[2]

In the first place, there was a whole series of offices originally connected with, or subsequently added to, the mediæval Exchequer.[3] At the head of the Exchequer was the Lord Treasurer—an office frequently put into commission in the seventeenth century, and permanently in commission ever since

[1] Vol. iv 65-66; above 462.

[2] Report on Public Income and Expenditure, Parlt. Papers 1868-1869 xxxv Pt. ii App. 13 pp. 334-349; F. S. Thomas, The Ancient Exchequer; Anson, The Crown ii Pt. i 186-198, Pt. ii 172-195.

[3] For the mediæval Exchequer see vol. i 42-44.

the beginning of George I's reign.[1] Very many of his clerks developed into specialized officials with a staff of clerks under them. Thus, one of his clerks on the account side of the Exchequer, became the clerk of the Pipe, or the ingrosser of the great roll of the Pipe;[2] another of his clerks became, in the sixteenth century, the auditor of receipt and writer of the tallies;[3] another became the clerk of the pells, who kept the records of money paid into and issued from the Exchequer.[4] In the thirteenth century the Exchequer had developed a Chancellor of its own;[5] and as early as Henry VII's reign, his office was united with that of the Under-Treasurer.[6] When the Treasurer's office was put into commission he was always one of the Lords of the Treasury;[7] but it was not till the beginning of the nineteenth century that he absorbed the powers formerly wielded by the treasury board, and became in effect the finance minister.[8] Some of his clerks, like the Treasurer's clerks, developed into specialized offices. Because the Chancellor kept the seal of the court of Exchequer and a small seal of his own, he had a sealer, who combined with that office the office of undersecretary to the Chancellor.[9] The Comptroller of the Pipe, who wrote a duplicate of the Pipe Roll, was originally a clerk of the Chancellor.[10] The clerk of the Writs was also one of his clerks.[11]

From the time of Lord Burleigh the Treasurer employed a secretary—an official who became the secretary to the treasury.[12] The office was sometimes duplicated in the seventeenth century; and from 1714 onwards there were always two secretaries.[13]

[1] Anne's death-bed appointment of the duke of Shrewsbury, above 50, was the last instance of the appointment of a Lord Treasurer; for an account of the solemnities attending the appointment of Godolphin in 1702, taken from the Black Book of the Exchequer, see Thomas, op. cit. 96-98.

[2] Ibid 113-114. [3] Ibid 129-130.

[4] Ibid 131-133; Anson, The Crown ii Pt. ii 175.

[5] Vol. i 44; Parlt. Papers 1868-1869 xxxv Pt. ii 335.

[6] "The functions of the Chancellor of the Exchequer with regard to the Public Revenue, as now exercised by him, appear to have originated in the time of Henry VII, when he was also appointed Under-Treasurer. Since this period the two offices have been held by the same person, though under different patents," ibid 335; Thomas, op. cit. 99-106.

[7] Anson, The Crown ii Pt. i 189, 191.

[8] "Business increased during the great wars of the last century, till it grew beyond the powers of a board to transact; the meetings became formal . . . after 1827 the First Lord and Chancellor of the Exchequer ceased to attend. . . . Since 1856 the meetings have been discontinued. . . . As the Treasury Board has diminished, so the Chancellor of the Exchequer has risen in importance. At the present time he is in fact a Finance Minister, and the Board of which he is a member consists of persons whose duties are unconnected with the work of the Treasury," ibid 191.

[9] Thomas, op. cit. 103. [10] Ibid 114-115. [11] Ibid 117.

[12] Parlt. Papers 1868-1869 xxxv Pt. ii 336—the Treasurer signified his wishes through his secretary, and "hence arose the system of Treasury Warrants, and all that complicated paper machinery which the Lord Treasurer's absence rendered needful for the disposal of the royal treasures"; for this machinery see below 517 n. 2.

[13] Thomas, op. cit. 142-143.

The four Tellers [1] were the officials who received and paid out the revenue.[2] They were associated with the Chamberlains—officials of the King's household or chamber; for the Treasury and the Exchequer were offshoots from the King's chamber; and the Treasurer and the Chamberlain had been its "joint and equal heads." [3] The latter office was subdivided into three—the hereditary sinecure office of Lord Great Chamberlain, the King's Chamberlain, and the Chamberlains of the Exchequer.[4] These Chamberlains of the Exchequer, being the representatives of the King's chamber, were not originally under the control of the Lord Treasurer.[5] They and the Treasurer had a joint control, a consequence of which was that originally "nearly all the minor offices of the Exchequer were held by deputies of the Treasurer and Chamberlains." [6] At the end of the seventeenth century they kept one of the keys of the Tellers' chests in which the money received was deposited; [7] and they kept copies of the rolls of receipt and issue.[8] But, at the end of the eighteenth century, their principal duties had come to be confined to the preparation and issue of the tallies.[9] There were the two Remembrancers—the King's and the Treasurer's—whose duties were concerned with the setting in motion of the process of the Exchequer against debtors, and the keeping of certain records.[10] In addition, there was a large number of other officials which had been added during the mediæval period to cope with the increased work of the Exchequer, such as the clerk of the estreats,[11]

[1] Since 1268 there were four Tellers, Thomas, op. cit. 134; but they did not get their modern duties in connection with the receipt and issue of money till Henry VII's reign, Parlt. Papers 1868-1869 xxxv Pt. ii 341; each Teller was the receiver of a specified part of the revenue, ibid 342.

[2] Each Teller had a large iron chest into which and out of which the money was paid. Each chest had three locks to which the Teller, the Auditor, and the clerk of the Rolls had keys; but by the end of the eighteenth century the money was actually received and issued by the Bank of England, two of whose cashiers sat in the office of the principal Teller; "all receipts from the principal receivers, and issues to the principal public accountants, who kept accounts at the Bank of England . . . were made by means of transfer tickets. At the close of each day, the balance was struck with each Teller; any excess of receipt over issue, or of issue over receipt was paid over to the teller, or the Bank cashiers," ibid; one of the Tellers' chests was robbed in 1724 of £4191 14s. 6d., and an Act was passed to make the loss good out of the sinking fund, 2 George II c. 6.

[3] Tout, Chapters in Medieval Administrative History i 94-95.

[4] Anson, The Crown ii Pt. ii 173-175.

[5] Parlt. Papers 1868-1869 xxxv Pt. ii 337.

[6] Tout, op. cit. i 96.

[7] Thomas, op. cit. 128; 8, 9 William III c. 28 § 12.

[8] Thomas, op. cit. 128.

[9] Anson, The Crown ii Pt. ii 175; in addition they, jointly with the Auditor, kept the standard pieces of gold and silver and the standard weights and measures, above 406.

[10] Thomas, op. cit. 109-113.

[11] Ibid 115—he issued process to collect the casual revenue under a seal of green wax—hence known as the summons of the green wax.

the foreign opposer,[1] the clerk of the nichils,[2] the surveyor-general of green wax,[3] the auditors of foreign accounts,[4] the cutter of the tallies,[5] the marshal,[6] the constable,[7] and the usher of the Exchequer.[8] Some of these officials were abolished by Burke's Act of 1783[9] after the death of their then holders; but very many were in existence right down to 1834.[10]

In the second place, this Exchequer organization had been added to, and many of these officials had been in effect superseded, by new departments set up by statute. Henry VIII's legislation had set up the courts of Surveyors[11] and Augmentations,[12] and provided them with an extensive staff. Both these courts were dissolved by letters patent in 1546, and their jurisdiction was given to a new court created by the same letters patent.[13] When this court was dissolved in 1553,[14] and its jurisdiction was assigned by letters patent of 1553-1554 to the Exchequer,[15] the Exchequer's staff of surveyors and auditors was necessarily increased;[16] and in 1625 a surveyor-general of Crown lands was appointed.[17] It was in connection with the court of Augmentations that the auditors of Imprest made their appearance. They were continued by the letters patent of 1553-1554, and became the officials who audited the money issued to departments for the public use.[18] More modern sources of revenue were put under the control of special commissioners, who were left very free to appoint clerks and organize the work of their departments.[19] Instances are the commissioners of excise, whom the Crown was given power to appoint in 1660;[20] the commissioners of customs, who were appointed when the customs ceased to be farmed in 1671;[21] the commissioners for the land tax appointed in 1692;[22] the commissioners for stamps[23] and

[1] Thomas, op. cit. 46, 116—he took the sheriffs' accounts of the casual revenue.
[2] Ibid 116-117—he enrolled debts due from casual sources of revenue to which the sheriff had returned "nichil," i.e. which he was not able to collect.
[3] Ibid 119—appointed by James I to oversee the clerk of estreats and the foreign opposer.
[4] Ibid 9, 122-124—they audited the accounts of bailiffs, ministers, and other receivers of land.
[5] Ibid 134. [6] Ibid 117. [7] Ibid.
[8] Ibid 118. [9] 23 George III c. 82 § 1.
[10] See the list of offices abolished by 3, 4 William IV c. 99 § 41.
[11] 33 Henry VIII c. 39; Thomas, op. cit. 12-14; for the earlier Tudor legislation as to survey and audit see ibid 9-12.
[12] 27 Henry VIII c. 27.
[13] See 7 Edward VI c. 2, which was passed to settle doubts as to the validity of this patent; Thomas, op. cit. 14-15.
[14] 1 Mary St. 2 c. 10. [15] Thomas, op. cit. 15.
[16] Ibid 15-20. [17] Ibid 121.
[18] Ibid 19, 124; Anson, The Crown ii Pt. ii 178-179.
[19] Below 497-498. [20] 12 Charles II c. 24 § 32.
[21] Report on Public Income and Expenditure, Parlt. Papers 1868-1869 xxxv 406; in 1722 the separate commissions for England and Scotland were consolidated, 9 George I c. 21 § 1.
[22] 4 William and Mary c. 1 § 7. [23] 5, 6 William and Mary c. 21 § 7.

hackney coaches[1] appointed in 1694; the commissioners for the licensing of hawkers appointed in 1698;[2] the commissioners for the salt tax appointed in 1701.[3] The creation of a Postmaster-General and a general post office in 1710, was necessarily accompanied by provisions for keeping and auditing the accounts of the post office.[4]

All these new departments of the revenue, some of which, as we shall see, expanded into very large and elaborately organized departments,[5] paid the money collected into the Exchequer, which saw to its custody, its issue, and its audit. All of them were subject to the control of the Treasury Board, who saw to it that the money was issued for the purposes for which it had been voted by Parliament.[6] Treasury control was strict in the early part of the eighteenth century; but it was relaxed between 1760 and 1780.[7] We shall see that the appointment of commissioners for public accounts in that year[8] marks the beginnings of a series of reforms, not only in the revenue department, but also in many other departments of the central government.[9]

The same flexibility and the same capacity for expansion as mark the officials and departments responsible for the collection and management of the revenue, can be seen in the officials and departments responsible for the *Army* and the *Navy*.

The departments which managed the army were, as Anson has said, "a medley of conflicting jurisdictions." This phenomenon was due partly to the desire of the Crown to retain its prerogative powers over the army, but mainly to the reluctance with which Parliament was brought to admit that the standing army was a permanent part of the constitution.[10] The oldest of the departments was the Ordnance Board, which was charged with the maintenance of forts, and the supply of guns and stores for these forts, for the army, and for the navy. It developed a pay department and a manufacturing department; and, in the course of the eighteenth century, it got Parliamentary powers for the acquisition of land for defence purposes.[11] Burke criticized it on the grounds that its military side was subordinate to its civil side, and that the naval was confounded with the land service.[12]

[1] 5, 6 William and Mary c. 22 § 2. [2] 9, 10 William III c. 27 § 2.
[3] 1 Anne St. 1 c. 21 § 26; by 5, 6 William and Mary c. 7 § 5 these duties had been placed under the management of the commissioners of excise, a plan which was reverted to in 1798, 38 George III c. 89 § 6; Hughes, Studies in Administration and Finance 198.
[4] 9 Anne c. 10 §§ 36, 37. [5] Below 498.
[6] Anson, The Crown ii Pt. i 192-193, Pt. ii 176-179.
[7] Ibid 161. [8] 20 George III c. 54. [9] Below 522.
[10] Anson, The Crown ii Pt. ii 222-224. [11] Ibid 224-225.
[12] Speech on Economical Reform, Works (Bohn's ed.) 91.

The other officials and departments responsible for the army were the Secretary at War who, down to 1783, was responsible, not to Parliament, but to the King or the general of the forces for the time being. His business was to "communicate the King's pleasure in matters of military administration, to prepare for the King's signature and to countersign warrants on the authority of which the Treasury paid over to the Paymaster of the forces the money voted by Parliament for the maintenance of the army." [1] Statutes of 1782 and 1783 placed him under a responsibility to Parliament, by requiring him to prepare the army estimates for Parliament.[2] The creation of the office of General Commanding-in-Chief in 1793, and of a Secretary of State for War in 1794, created considerable difficulties as to the spheres of action of these authorities.[3] The commissariat of the army was superintended by the commissariat department of the Treasury,[4] and a Board of General officers superintended its clothing.[5] The Home Secretary, because he was responsible for the maintenance of order at home, controlled the movements of the army at home; and the Colonial Secretary controlled its movements abroad.[6] The Paymaster of the forces received and disbursed the pay of the troops.[7]

The navy was under the control of the Lord High Admiral, which office has been in commission since 1708, except for a short interval in 1827 when the duke of Clarence was Lord High Admiral.[8] Subordinate to the Admiralty Board were the Navy Board which looked after pay and stores other than ordnance and victualling, and the Victualling Board which looked after the supply of food and drink.[9] The Treasurer of the Navy, who was always a member of the Navy Board, held the same position in relation to the navy as the Paymaster of the forces held in relation to the army.[10]

The organization of the *King's Court and Household* was more thoroughly archaic than any of the other departments of central government—more archaic even than much of the Exchequer machinery. Its leading characteristics were critically described by Burke in his great speech on Economical Reform in 1780. First, he said, the King occupies at least five distinct characters.

> Cross a brook and you lose the king of England; but you have some comfort in coming again under his majesty, though "shorn of his beams" and no more than a Prince of Wales. Go to the north and you find him dwindled to a Duke of Lancaster; turn west of that north, and

[1] Anson, The Crown ii Pt. ii 226-227.
[2] 22 George III c. 81; 23 George III c. 50.
[3] Anson, The Crown ii Pt. ii 227.
[4] Ibid 196; Thomas, op. cit. 144-145.
[5] Anson, The Crown ii Pt. ii 223.
[6] Ibid 223.
[7] Ibid 227.
[8] Ibid Pt. i 201.
[9] Ibid.
[10] Ibid 201-202.

he pops upon you in the humble character of Earl of Chester. Travel a few miles on, the Earl of Chester disappears; and the king surprises you again as Count Palatine of Lancaster. If you travel beyond Mount Edgecombe, you find him once more in his incognito, and he is Duke of Cornwall.[1]

And "everyone of those principalities has the apparatus of a kingdom . . . the formality and charge of the exchequer of Great Britain"—"exchequers of unfrequent receipt and constant charge."[2] Secondly, the royal household was mediæval in its organization. "It has its own magistrates, courts and by-laws";[3] and this feature was the origin of the Board of Green Cloth, the accounting department of the household, which was composed of the leading officials of the household.[4] It had many departments—the office of the great wardrobe, the office of removing wardrobe, the jewel office, and office of the robes. "For the payment of these useless establishments there are no less than three useless Treasurers; two to hold a purse and one to play with a stick."[5] It had many officials who held sinecure posts in the stables and in the kitchen, which were mainly survivals of a past age.[6] In a famous passage in his speech Burke tells how, in 1777, Lord Talbot failed to effect reforms in the King's kitchen, because "the turnspit in the King's kitchen was a member of Parliament."[7]

These illustrations of the way in which the older officials and their departments of government had been developed, with some help from the Legislature, from the primitive organization of the court and household of the Norman and Angevin kings, prove the adaptability to new needs of the machinery of central government. But the latest, and, from the point of view of the modern machinery of central government, the most important instance of such a development is to be found in the evolution of the office of Secretary of State.[8]

[1] Works (Bohn's ed.) ii 71. [2] Ibid 71, 74.

[3] Ibid 82; a collection of Ordinances and Regulations of the Royal Household Edward III—William and Mary was published in 1790 by the London Society of Antiquaries; for other authorities see Tout, Chapters in Mediæval Administrative History i 36-38.

[4] For the Records of this board see E.H.R. xxxiv 237; we have seen, vol. i 208, that the King had a court—the court of the Marshalsea—for the trial of cases between members of the King's household arising within the verge; when the Board of Green Cloth was abolished in 1782 the jurisdiction of this court was preserved, 22 George III c. 82 § 5.

[5] Speech on Economical Reform 88-89. [6] Ibid 107.

[7] "Lord Talbot attempted to reform the kitchen; but such, as he well observed, is the consequence of having duty done by one person, whilst another enjoys the emoluments, that he found himself frustrated in all his designs. On that rock his whole adventure split. . . . Why? It was truly from a cause which though perfectly adequate to the effect, one would not have instantly guessed.—It was because the *turnspit in the king's kitchen was a member of Parliament*," ibid 86.

[8] On this subject see F. M. G. Evans' book on The Principal Secretary of State, which gives a most lucid and comprehensive account of the development of the office.

We have seen that in the Tudor period the secretary of state had ceased to be merely a household official, and had become an official of the state; and that he was becoming an official of increasing importance, partly because he was a new official whose powers were very indefinite, but chiefly because he, as the King's secretary, was the channel of communication between the King and the other officials and departments of government, and between the King and his subjects.[1]

As "the middleman" in diplomatic, political, and administrative affairs, and as the person in close touch with the king and responsible for his correspondence, the principal secretary was the natural instrument of the royal prerogative.[2]

Upon his shoulders, therefore, there tended to fall the regulation of all those new governmental activities, which were the necessary concomitants of the rise of the modern state. As early as 1539 he was given rank and precedence after the great officers of the household;[3] and before the middle of the seventeenth century he had ceased to be merely the confidential servant of the King, and had come to be a servant of the state. His office had followed the same course as many of the older offices—it had ceased to be an office of the household, and had come to be an office of the state. In 1626 Charles I objected to the action of the House of Commons in examining the letters written by the secretaries of state, because he regarded them as his confidential servants. The House of Commons justified its action by contending that the secretaries of state were the servants of the state, and that therefore their letters were part of the public records.[4] In this, as in many other matters, the view taken by the House of Commons was the view which prevailed. The fact that the secretary of state was a minister of state, responsible both to the King and Parliament, was emphasized after the Restoration;[5] and, after the Revolution, when Parliament had become the predominant partner in the state, it was quite clear that no secretary of state could continue to hold office unless he could retain the confidence of Parliament.

The position which the secretary of state had attained at the beginning of the eighteenth century can be summed up as follows.[6] First, he kept the King's signet, and the affixing of the signet and his own counter signature were necessary stages in the obtaining of grants and pardons, the issue of letters patent,

[1] Vol. iv 66-67; for the mediæval history of the Secretary see Evans, op. cit. chap. i; it is not till Henry VIII's reign that his office becomes important.
[2] Evans, op. cit. 2. [3] 31 Henry VIII c. 10.
[4] Evans, op. cit. 189, citing Rushworth Pt. i 223-245.
[5] Evans, op. cit. 138, 142-143.
[6] I have taken this summary from ibid 6-9.

and the issue of royal letters. "It was on account of such duties as these . . . that the idea evolved of the secretary as the channel of communication between Crown and subjects."[1] Secondly, he was an important member of the Tudor and early Stuart Council, and later of the foreign committee and the cabinet.[2] An increasing number of matters were left to the secretary to advise upon and to deal with, not only because he was in touch with the King and with the details of business of very various kinds, but also because he was beginning to be the head of a large secretarial department.[3] Thirdly, even in the Tudor and Stuart period he frequently represented the King in the Houses of Parliament.[4] After the Revolution the importance of this part of his duties enormously increased. Fourthly, he was the channel through which the King conducted the foreign policy of the country; and, in the eighteenth century, his control over the conduct of this policy gradually increased, both because he was the person responsible for the working of the diplomatic machine, and because he must justify the policy pursued to Parliament. Fifthly, he was regarded as the person chiefly responsible for maintaining the peace of the kingdom. This brought him into very close touch with the administration of the criminal law; and it is for this reason that, in the eighteenth century, questions as to the rights possessed by the government to arrest suspects,[5] to search their houses,[6] and to intercept correspondence,[7] were raised by the claim of the secretary of state to exercise these powers. It was for this reason that a strong and able secretary was able to do much to remedy the heterogeneous character of, and the lack of interdependence existing between, the different departments of the central government. As Thomson has pointed out, Pitt could not have taken complete charge of the operations during the Seven Years War, if he had not held the office of secretary of state. "A combined military and naval expedition required the co-operation of the Admiralty, the War Office, and the Ordnance. This could only be obtained when all obeyed a Secretary of State. On him everything ultimately depended."[8]

[1] Evans, op. cit. 6.

[2] Above 470-471.

[3] Since he assiduously attended the Council and its committees, and since he had an official department at his back, it became "the inveterate habit of committees of every age to leave things to the secretary to inquire, act, and report at the next meeting, and it is obvious how his continual attendance and presence, and the office organization behind him, made for his increased importance . . . the secretary was the one element of permanence and the rallying point of more amateur politicians," Evans, op. cit. 225.

[4] 31 Henry VIII c. 10 provided that if he was a baron he should take precedence in Parliament of all other barons, and if a commoner that he was entitled to sit on the woolsacks in the House of Lords.

[5] Below 661-671.

[6] Ibid.

[7] Thomson, Secretaries of State 1681-1782 153-155.

[8] Ibid 88

It is quite clear that one man, though helped by a secretarial department, was not capable of performing all these functions. After 1540 there were generally two secretaries of state ;[1] and, at the end of the seventeenth century, one took what was called the Northern, and the other the Southern Department. This was a division which affected mainly foreign and colonial business[2] —domestic business was common to both ; and it "was not a hard and fast division."[3] In fact, changes were made from time to time in the number and the allocation of the duties of the secretaries ;[4] and these changes illustrate the flexibility of the machinery of central government. This characteristic of flexibility is still more noticeable in the evolution of the departments over which the secretaries of state presided. Their departments, like the departments of the other principal ministers of state, grew up gradually, and were gradually modified to meet the exigencies of business.

The secretaries of state kept the King's signets ;[5] and these signets, together with two smaller seals, are still delivered to them when they are appointed to the office.[6] The clerks of the signet were originally the secretarial staff of the secretary of state.[7] But these clerks, like the clerks of the privy seal,[8] developed an independent office, as distinct from the secretary of state as the clerks of the privy seal were from the keeper of the privy seal.[9] Their duty came to be to prepare a certain class of documents for the King's signature ;[10] and they divided the work amongst themselves, in a manner not unlike that

[1] Evans, op. cit. 35 ; there was only one secretary during the greater part of Elizabeth's reign ; but at the end of her reign Sir Robert Cecil had a colleague, Anson, The Crown ii Pt. i 175.

[2] "The Secretary for the Southern Department corresponded with British envoys in France, Switzerland, Italy, the Iberian Peninsula, and Turkey. Furthermore, Ireland, the Colonies, and the Channel Isles were also regarded as being within his Department. The Secretary for the Northern Department corresponded with British envoys in the Empire, Holland, Scandinavia, Poland, and Russia," Thomson, Secretaries of State 1681-1782 2-3 ; Calendar of Home Office Papers, 1760-1765 ii-iii.

[3] Thomson, op. cit. 3.

[4] In 1616 there were three secretaries ; 1709-1746 there was generally a third secretary for Scotch business ; for the history of this office see Thomson, Secretaries of State 1681-1782, 29-38 ; 1768-1782 there was a third secretary for colonial business, whose status, as compared with that of the two other secretaries, was long uncertain, ibid 56-58, 60-61 ; but it was settled that his status was the same as that of the other two, and the settlement of this point was important when, in the last years of the eighteenth and in the nineteenth centuries, their number increased, ibid 61 ; in 1772 the King suggested a new allocation of duties, on the occasion of the vacancy of the office of secretary of state for the colonies, "to prevent the possibility of jarrings in departments," of which North did not wholly approve, Fortescue, Correspondence of George III ii 378-379, 379-380 ; in 1785 a Home Department was established, Calendar of Home Office Papers 1760-1765, iii.

[5] Evans, op. cit. 194.

[6] Anson, The Crown ii Pt. i 182 ; Evans, op. cit. 205-206.

[7] Ibid 18, 156, 194.

[8] Anson, The Crown ii Pt. i 171.

[9] Evans, op. cit. 196, 201-202.

[10] Ibid 18, 194.

adopted by the Six Clerks in Chancery.[1] When the signet office had come to be thus specialized, the secretaries were obliged to make other arrangements for their clerical staff. As early as Henry VIII's reign the secretary of state was employing clerks of his own, distinct from the clerks of the signet.[2] In the sixteenth and early seventeenth centuries the secretaries of State employed secretaries for foreign tongues, who drafted foreign letters under their instructions,[3] and a staff of clerks, some of whom were permanent, while others were the personal servants of the particular secretary.[4] Besides there was an expert decipherer,[5] a person skilled in illuminating and embellishing letters to foreign princes,[6] and translators from foreign tongues.[7] "On the whole the members of the staff were well travelled, well read men who had attended the university and who sometimes rose to high office in the state."[8] The size of the staff increased after the Restoration;[9] and, in the last quarter of the seventeenth century, the chief assistants to the secretaries of state were recognized as state employés and got the title of under-secretaries of state.[10] These under-secretaries were sometimes promoted clerks, sometimes distinguished men of letters, and sometimes budding diplomats or politicians.[11] The clerks who were appointed by the secretary generally held their position so long as they were fit to work.[12] They formed the permanent staff. As Miss Evans has pointed out,[13] "the gradual accumulation of precedents for the drawing of commissions, warrants, and passes, and all the minutiæ of every-day routine . . . formed by degrees a background of tradition and common experience," with the result that "the secretarial offices were transformed from mere collections of independent employés to departments of state," "bound together increasingly by what may be termed as one chooses *esprit de corps* or the red tape of bureaucracy." With the development of party government "one secretary of state succeeded another as each

[1] Vol. i 422; Evans, op. cit. 198.
[2] Ibid 18, 152-154, 156.
[3] Ibid 155, 169-173.
[4] Ibid 155-156, 158-159.
[5] Ibid 159, 161-163.
[6] Ibid 159-160.
[7] Ibid 160; in the eighteenth century some of these posts, e.g. such posts as the Latin Secretary, and the translators, became sinecures, and were used to increase the emoluments of the under-secretaries and the clerks, Thomson, op. cit. 140.
[8] Evans, op. cit. 160-161.
[9] Ibid 163.
[10] Ibid 164-165; in 1684 the Northern and Southern Department each had two under-secretaries; the number of clerks varied during the eighteenth century; between 1760 and 1782 the number in the Southern Department varied from eight to fourteen and was usually ten: in the Northern Department, from eight to twelve and was usually eight, Thomson, Secretaries of State 1681-1782, 128-129.
[11] Ibid 130-133.
[12] Ibid 134; see S.P. Dom. 1702-1703, 516-517, for a petition by these under-secretaries and first clerks for an increase in pay because of the smallness of the fees to which they were entitled.
[13] Evans, op. cit. 168.

political party triumphed in turn, until the secretaries of state themselves had little immediate connection with the every-day administration of the secretariat, a government department under the control of a permanent under-secretary of state." [1] The result is that the secretary of state gradually came to be a purely political minister who is "little more than the nominal head of the department which, regardless of the vicissitudes of party politics, administers the every-day government of England." [2] This development was completed in the second half of the eighteenth century.[3]

The development of a departmental routine and technique, which guided and controlled the action of the nominal heads of the department, had, in the past, moulded the organization and working of many of the older departments of the central government; and it continued and still continues to mould the organization and working of the many new departments required by the modern state. It was in this way that order and system were introduced into the regulation of those activities of the state, with which the older departments were concerned. It was in this way that effective regulation was provided for those new spheres of the state's activity, the emergence of which was the necessary consequence of the rise of the territorial state, and the increasing complexity of the tasks set to it by an advancing civilization. In so far as the flexibility of the machinery of central government assisted these developments, its results were good. New departments of state and new officials could be easily created as and when they were needed; and the new departments created by statute were able the more easily to organize themselves.[4] The extent to which the departments of the central government had thus expanded in the eighteenth century is shown by the fact that Somerset House was acquired from the Crown,[5] and handsome new buildings were erected on the site for their accommodation.[6] But this flexibility also

[1] Evans, op. cit. 333. [2] Ibid 334.

[3] The change in the status of the under-secretary, from a personal dependent, of the secretary to a permanent official, was not quite complete in 1765, Namier, Structure of Politics, i 47; but the change was then taking place both with respect to the under-secretaries of state and the secretaries to the Treasury and the Admiralty, ibid 48, 50-53; cp. the account given of the secretary of state's office in a Parliamentary Report of 1786, Parlt. Reports 1792-1793, vol. x, cited Thomson, op. cit. 135-136.

[4] Some of the newer departments, e.g. the salt office, above 491, made good rules to secure suitable officers, and to supervise their work, E. Hughes, Studies in Administration and Finance 200-201, 203-204, 205-209; but later in the century the extension of Treasury control, which meant the appointment to offices for political reasons, undermined its efficiency, ibid 289, 306-307, 311-315.

[5] Parlt. Hist. xviii 619—Buckingham House was settled on the Queen in lieu of Somerset House; 15 George III c. 33.

[6] See Parlt. Hist. xxii 298, for Burke's praise of these buildings—he said that they were not among the deeds of the Board of Works of which he disapproved.

produced bad results, which were tending in the eighteenth century to predominate over the good results. The gradual changes made to meet new conditions had, as a rule, taken the form of creating new offices without abolishing the old. There was much that was modern and efficient, but its action was constantly hampered by the old and obsolete.[1] The machinery as a whole was a strange mixture of mediæval and modern—a mixture of mediæval and modern ideas as well as of mediæval and modern institutions; for, as we shall now see, the mediæval institutions perpetuated the mediæval ideas.

The continuity of the development of this machinery and its consequent complexity and inefficiency.

Mill in his essay on Bentham[2] said of English law in the eighteenth century that,

> all ages of English history have given one another rendezvous in English law; their several products may be seen all together, not interfused, but heaped one upon another, as many different ages of the earth may be read in some perpendicular section of its surface—the deposits of each successive period not substituted but superimposed on those of the preceding.

This description was more especially true of that part of English public law which is concerned with the machinery of central government. In this machinery there was perpetuated all those mediæval ideas as to the tenure of office, and as to the manner of paying officials, which I have explained in relating the history of the official staffs of the courts of common law and the court of Chancery.[3] We have seen that, in the Middle Ages, the conception of tenure was applied to offices. An office was granted to a person, as if it was a piece of property. The office gave the official certain rights and placed him under certain duties. He had a right to be paid fees by the public for doing the duties, which duties could be performed either by himself or by a deputy or deputies. In course of time these deputies often

[1] "We have on our establishment several offices which perform real service We have also places that provide large rewards for no service at all. We have stations which are made for the public decorum; made for preserving the grace and majesty of a great people. We have likewise expensive formalities, which tend rather to the disgrace than the ornament of the state and the court. This is the real condition of our establishments," Burke, Speech on Economical Reform, Works (Bohn's ed.) ii 67.

[2] Dissertations and Discussions i 369.

[3] Vol. i 246-261, 424-428, 439-442; this method of payment by fees was extended to the Speaker and other officers of the House of Commons, Porritt, The Unreformed House of Commons i 436, 490, 496, 471; vol. xi 337-340; note also that the messenger of the great seal, who delivered the writs for Parliamentary elections, was entitled to a fee of five guineas from a borough, and ten guineas from a city or county, Porritt, op. cit. i 22.

became independent officials, and appointed sub-deputies to do the work; so that we get a hierarchy of officials, all of whom were paid by fees, and all of whom had a proprietary interest in their offices. The result was that, though the duties once performed by these officials became obsolete or merely formal, it was impossible to get rid of them. Since the right to the office was in many cases a freehold,[1] which gave the holder a vote for the election of members of Parliament,[2] it could not be abolished; for its abolition would have deprived the holder of his freehold. Therefore the office remained, and added to the complexity of the machinery of government. Moreover, in many cases, these offices became increasingly valuable as the volume of business and therefore the volume of fees increased.

In all parts of the machinery of central government we can see the results of these mediæval ideas. They are present not only in the older offices and departments of government, but also in some of the more recent; for these ideas were infectious. They infected all parts of the machinery of government, partly because they were advantageous to officials who were able to gain large rewards for no work or little work, but chiefly because they gave much valuable patronage to the King. In many cases the salary paid from the civil list was small, but the appointment carried with it the right to extract large fees from the public.[3]

[1] These freehold offices were incorporeal hereditaments, Bl. Comm. ii 36; cp. vol. i 249; vol. ii 355-357; vol. vii 314, 317; above 462 n. 5; an illustration of the manner in which these offices were regarded is afforded by a petition in 1702 of the grantees of the office for making writs of subpœna, that, as the office was granted for the lives of three persons and only one survived, other lives might be added; this, it was said, had been done in the past, and "all or most of your petitioners or those for whom they are in trust, have, as usual in like cases, settled their respective interests of and in the said profits for the benefit of themselves and children, on which many of them depend for their future sustenance," S.P. Dom. 1702-1703 425; for this office see vol. i 441.

[2] Porritt, The Unreformed House of Commons i 23.

[3] Thus, to take a relatively modern example, the salary of a secretary of state in the seventeenth century was £100 a year, but its real value was estimated at something like £2,000 a year—made up by allowances, perquisites and fees, F. M. G. Evans, The Principal Secretary of State, 211; Thomson, op. cit. 145-148; for a list of the fees payable to secretaries of state and others on grants passing the seals, see S.P. Dom. 1702-1703, 15-16; in 1783 the question as to the right of the secretaries of state to take the fees for passports was raised—apparently they had been accustomed to appropriate them, Parlt. Hist. xxiii 950; similarly the under-secretaries and first clerks were paid by fees, Thomson, op. cit. 139-140; this was in effect the mediæval system which, in the Middle Ages, was applied to all officials from the highest to the lowest—thus Miss Cam says, The Hundred and the Hundred Rolls, 143, "The farm payable by a hundred bailiff to the sheriff or to his lord represented a rough estimate of the income that the bailiff hoped to make out of the incidental fees and profits arising out of the work he did in the hundred, less that margin which made it worth his while to take on the job. As a rule . . . the local government official did not draw a salary. . . . On the contrary he paid so much a year for the office. . . . He expected to make a profit on the farm he paid for his office"; see above 230 for the survival of this idea in the eighteenth-century system of local government.

The principal consequences of these ideas can be grouped under the following heads: (*a*) The perpetuation of sinecure or semi-sinecure offices; (*b*) The perpetuation of obsolete methods of doing business; (*c*) The recruitment of the civil service by favour; (*d*) Corruption and extravagance.

(*a*) *The perpetuation of sinecure or semi-sinecure offices.*

Many sinecure offices were held, often by virtue of letters patent, for life or lives, or for estates of inheritance. The Exchequer, being the oldest of the departments of government, had more of these sinecures than any other. Hale, writing in the latter half of the seventeenth century, says: [1]

> There are at this day in the exchequer many great officers, that receive the profit and fees of their office, and either do not attend at all, or know not what belongs to it, but only perchance once a term sit with some formality in their gowns, but never put their hands to any business of their offices, nor indeed know not how. For instance, the king's remembrancer, the receiver and remembrancer of the first fruits, the usher of the exchequer, the chief marshall of the exchequer, the chamberlains of the exchequer, the chief clerk of the pipe, and some of the auditors that I could name. These, and some other nominal officers are great men, enjoy their pleasures, understand not or attend not to their offices, but dispatch all by deputies; and by this means an unnecessary charge is drawn upon the king and his people, for the chief officer has the profit, and the deputy he hath some, or else he could not live.

All this was equally true in the eighteenth century. Burke in 1780 said of the patent offices in the Exchequer: "They are sinecures. They are always executed by deputy. The duty of the principal is as nothing." [2] And it was not only in the Exchequer that these sinecure offices existed. The following two lists from the Shelburne MSS.[3] show that many existed in the departments of the customs and excise:

[1] Considerations Touching the Amendment of the Lawes, Harg. Law Tracts, 279.

[2] Works (Bohn's ed.) ii 100.

[3] A. L. Cross, Eighteenth Century Documents Relating to the Royal Forests the Sheriff and Smuggling, taken from the Shelburne MSS. in the William L. Clements Library, Ann Arbor; probably these lists were drawn up for Shelburne in pursuance of his large plans of administrative reform, above 117-118.

(1) *An Extract from Lists of Useless and Sinecure Offices* [1]

Offices.	*Persons holding them.*	*Annual Salaries.*
Collector Outwards for 2 Lives	Geo : Duke of Manchester .	£1,500
Collector Inwards. N.B. under the grant if Mr. Mann had left a Daughter of two Years old, she would have been Collector, to receive 2 Million & half annually.	Robert Mann & his Heirs (in Trust) for the Lives of the late Lord Walpole & Sir Edward Walpole. In reversion to Mr. Jenkinson .	£1,500
Searcher	Charles Churchill . . .	£600
Comptroller	Henry Duke of Newcastle In reversion to 2nd [Lord] Guildford & his Heirs for the lives of Messrs. North .	£1,500
Surveyor General	Thomas Lord Pelham . .	£950
Customer of Chester	John Pelham . . .	£700
Searcher	Henry Shelly . . .	£600
Customer of Milford	James Pigot . . .	£350
Usher in the Long Room	William Vary . . .	£600
Comptroller of Southampton	Robert Stannard of Euston, Suffolk	£200
Surveyor of London	Henry Lord Stawell . .	£800
Inspector of Exchequer Books	Heneage Legge . . .	£220
Registrar of Warrants	Heneage Legge . . .	£250
Chief Searcher London	William Legge . . .	£400
Searcher London	Francis North . . .	£600
Comptroller of Chester	Sir John Burgoyne in the army	£450
Customer of Cardiff	John Osborne Coll. in the Militia	£200
Customer of Newcastle outwards	Richard Williams Major in the Army	£400
Comptroller of Customs on Wool	Richard Williams . .	£100
Searcher of Chester .	Jeremiah Robinson . .	£700
Inspector of Prosecutions	William Poyntz In reversion to Mr. Robinson & Mr. Neville his Son in Law .	£3,000
Customer of Southampton	William Brunmell . .	£430
Register of Seizures	Bryan Broughton . .	£320

(2) *List of Sinecures* [2]

Places.	*Possessors.*	*Salaries.*	*Appointments.*
Five Commissioners of Appeals [3]	Robert Coney, John Cowslade, George Chadd, Daniel Bull, Robert Hicks — Esqrs.	£200 per ann. each	By Treasury Patent
One Register to Do. [3]	William Milton	£100 per annum	

[1] At pp. 284-285. [2] At pp. 286-287. [3] Absolute Sinecures.

Places.	*Possessors.*	*Salaries.*	*Appointments.*
One Door-keeper to Do.[1]	Samuel Smith	£40 per annum	By Treasury Warrants
One Messenger to Do.[1]	Peter Faddy .	£40 per annum	
Comptroller General of Excise etc.[2]	Thos. Butler, Esqr.	£2460 per Ann. for himself Deputy and Clerks	By Treasury Patent
Comptroller of Cash [3]	Sir Richard Temple, Bart.	£800 per Annum for himself and Clerks	By the Commissioners in Pursuance of Treasury Warrant
Auditor for Excise etc.[4]	Richard Stonehewer, Esqr.	£1240 per Annum for himself Deputy and Clerks	By Treasury Patent
Auditor for Hides etc.[5]	Thomas Rumsey, Esqr.	£400 per Annum for himself and Clerks	By Treasury Warrant
Register to the Commissioners of Excise [6]	Thomas Ryder, Esqr.	£450 per Annum	By Treasury Patent
Inspector of Inland Duties [7]	Mont. Burgoyne, Esqr.	£500 per Annum	By the Commissioners in Pursuance of a Treasury Warrant
Housekeeper [8]	Mrs. Ann Cavendish	£200 per Annum	By Treasury Warrant

[1] Absolute Sinecures.

[2] This Office is executed by Deputy appointed by the Principal with the Approbation of the Treasury; and with respect to the Principal is an absolute Sinecure, he reserving to himself a Salary of £700 per Annum.

[3] A Place of but little Attendance for the Principal, the Business being chiefly executed by two Clerks; the Principal reserving to himself a Salary of £610 per Ann. But he gives Security in the sum of £20,000.

[4] This Office is executed by Deputy appointed by the Principal, with the Approbation of the Treasury, And with respect to the Principal is an absolute Sinecure, he reserving to himself a Salary of £750 per Annum.

[5] This is an Office of but little Business with respect to the Principal; has always been granted as a Sinecure, but the present Possessor superintends the Business himself, and reserves a Salary of £300 per Annum.

[6] This Office is a Sinecure with respect to the Principal who reserves to himself a Salary of £420 per Annum.

[7] An Office of Business; but with respect to the present Possessor is an absolute Sinecure, he reserving to himself a Salary of £473 14s. 0d. per Annum.

[8] An Absolute Sinecure.

Hale asked the question—" If these offices are not necessary why are they continued? If they are, why should they not be executed at the charge only which accrues from the deputy, and the benefit of the nominal officer that doth nothing be retrenched as a needless charge? "[1] Many answers were given to this question. These sinecures or semi-sinecures were defended, partly because they supplied pensions to deserving servants of the state,[2] and partly because it was recognized that the patronage, which they gave to the Crown, helped to preserve the balance of power in the constitution as between King, Lords, and Commons.[3] But it should be noted that the reason which Burke gave for not abolishing these offices forthwith was the fact that they were property.

These places and others of the same kind, which are held for life have been considered as property. They have been given as a provision for children; they have been the subject of family settlements; they have been the security of creditors. . . . If the discretion of power is once let loose upon property, we can be at no loss to determine whose power, and what discretion, it is that will prevail at last.[4]

Burke therefore proposed a gradual reform. These offices were to be retained as long as those who owned them lived because they were property. When their owners died they were not to be abolished because they were useful as pensions; but, from " the time that the present lives and reversions shall respectively fall," they were to carry fixed salaries.[5] We shall see that that was the plan ultimately adopted.[6] In 1783 the salary of the four Tellers of the Exchequer was fixed at £2,700, and the change was to take effect as each vacancy occurred.[7]

In 1812 Lord Camden, the last of the tellers under the old system, volunteered a surrender of so much of his emoluments as exceeded £2700 a year. When these offices were abolished in 1834 Lord Camden was still a teller and his contribution to the revenue had amounted to £244,000, being the amount of his fees in excess of the statutory payment.[8]

[1] Considerations Touching the Amendment of Lawes, Harg. Law Tracts, 279.

[2] Burke said: " There is a time when the weather-beaten vessels of the state ought to come into harbour. . . . There ought to be some power in the Crown of granting pensions out of the reach of its own caprices. An entail of dependence is a bad reward of merit," Works, ii 102-103; and with this view Fox agreed, see Parlt. Hist. xxiii 929; and it was approved by the reformers of the early years of the nineteenth century, Cobbett, Political Register March 1 1806, cited Halévy, History of the English People in 1815 (Engl. tr.) 14 n. 1.

[3] Below 519.

[4] Works ii 101; with this view Fox agreed, Parlt. Hist. xxiii 1092, xxv 310; and Rigby said that " they were in truth and in fact as much freeholds as any private property whatever, and to be held as sacred by Parliament," ibid xxiii 1095.

[5] Ibid xxiii 1095. [6] Below 523.

[7] 23 George III c. 82 § 5; cp. Keir, Economical Reform, L.Q.R. l 376.

[8] Anson, The Crown Pt. ii 141-142; it should be noted that Horace Walpole, who held the sinecure office of Usher of the Exchequer, was willing to accept any

The extent to which the existence of these sinecure or semi-sinecure offices permeated the whole civil service with the mediæval idea that offices were property; the obstacle which this idea placed in the way of thorough and speedy reform; and the long life of this conception—can be illustrated by a relatively modern example.[1] In 1848 the moneyers employed by the mint claimed that they were a corporation recruited by co-optation from their apprentices, and that this corporation had the exclusive right to coin bullion into money.[2] They admitted, indeed, that the rates and conditions of payment could be varied by agreement, but they claimed that their exclusive right to coin was their property of which the Crown could not deprive them.[3] They therefore maintained that the royal commissioners, appointed to enquire into the working of the mint, had no right to inspect or to call for information as to their accounts.[4] In effect, therefore, they claimed to hold in their corporate capacity a freehold in their office; and it was only by an elaborate historical enquiry that their claim was proved to be baseless.[5] It was proved that they were not a corporation; [6] that they did not exist as a distinct body till the middle of the sixteenth century; [7] that till 1706 they had only occupied the status of journeymen and day labourers; that the reduction of their number to eight with four apprentices, coupled with the division of the large profits of the recoinage of gold in 1774, raised them above the condition of day labourers, and was "the source of their present status and condition"; [8] and that they had no right to the exclusive privilege of coining money—"at the utmost it never amounted to more than an equitable or moral claim, correlative to the arbitrary and despotic control, which until three centuries ago used to be exercised over them." [9]

This episode shows, first, that this proprietary conception of office was so widespread in the eighteenth century, that a set of

reforms in his office which were for the national advantage, Letters (ed. Toynbee) x 55-56; xii 308, 314-315, 397; xiii 9-11; Supplement iii 38-40; though, ibid xiii 120, he said that his place in the Exchequer was "much sunk" by the measures of economic reform.

[1] Royal Mint Commission, Parlt. Papers 1849 vol. xxviii.

[2] Report vi, vii-viii. [3] Ibid vi. [4] Ibid viii.

[5] Statement (A) by the Secretary, Report 1-4, 48-62.

[6] Ibid 48-53.

[7] The conclusion reached is thus summarized by the secretary in his abstract: "The moneyers are not and never were a corporation by themselves, but are members of the general London and Canterbury Exchange or Mint Corporation; that in all probability they did not exist in the form even of a company till after the middle of the sixteenth century; and that the idea of their being, or having been, a Corporation, has probably arisen from the ambiguous use of the word 'Monetarius' or 'Moneyer' in two senses, viz., in the wide sense of a Minter or Mint officer and servant, and in the limited sense of 'Moneyer,' as one of the classes of Mint journeymen operatives," Statement (A) by the Secretary, Report 3.

[8] Ibid. [9] Ibid 60.

civil servants, who had only attained a status above that of day labourers in the course of that century, could claim that they had acquired a proprietary office with the privileges of which it was beyond the competence of the Crown, and therefore of a royal commission, to interfere; and secondly, it illustrates the obstacle placed by this proprietary conception upon reform—if the moneyers could have established their claim, as many officers in the eighteenth century were able to do, they could not have been deprived of their exclusive right without compensation.[1] As we shall now see, the natural result of this mediæval idea that office was property, was the perpetuation of obsolete methods of doing business, and the recruitment of the civil service by favour.

(*b*) *The perpetuation of obsolete methods of doing business.*

Of this many examples can be given from the practice of the Exchequer. The following three examples will suffice: First, an Act of 1733 declared that the Act of 1731, which substituted English for Latin and French, and ordinary handwriting for court hand, in judicial proceedings, did not apply to the Exchequer;[2] and Latin and the Roman numerals were still used till 1834.[3] Secondly, the system of tallies was in use till 1826. "The tally was a willow stick, not exceeding five feet in length, about one inch in depth and thickness, with the four sides roughly squared. On one of the four sides the amount was expressed in notches. On each of the two sides next the notched side, the description of the payment was written. The stick was split in half through the notches."[4] The Exchequer kept one half, the person making a payment, or an accountant who was directed to make a payment, received the other half.[5] Tallies acknowledging that a person had made a payment to the Exchequer were called tallies of *Sol*—derived from the word *solutum* which was the first word on the pell of receipt. Tallies directing an accountant to pay were called tallies of *pro*, because the tally was issued *pro*, i.e. *for* the benefit of some specified person.[6] Thirdly, we have seen that the modern method of keeping the government's cash at the Bank of England, and paying it in and issuing it through the Bank, had been, so to speak, pieced on to the primitive method of storing it in the

[1] The Commissioners said, Report vi, "if the abolition of their long continued privilege of exclusive employment in the work of the coinage should ever give them a title to pecuniary compensation for the loss of its advantages, they have in no way established their right to its perpetual continuance."

[2] 4 George II c. 26; 6 George II c. 6; Return of Public Income and Expenditure, Parlt. Papers 1868-1869, xxxv Pt. ii 342.

[3] Ibid.

[4] Ibid 339.

[5] Ibid 339, 340.

[6] Ibid.

tellers' chests, and physically putting it in and taking it out of these chests.[1]

These forms, though cumbersome, were relatively harmless. But there was another consequence of the financial methods in force before the era of banks which was far from harmless.

We have seen, when dealing with the court of Chancery, that all the money in court was handed over to the masters, who could and did make a profit from its use during the many years that a suit in Chancery lasted. But we have seen that this system was put an end to, as a result of the exposures which followed the bursting of the South Sea Bubble and the impeachment of Lord Macclesfield.[2] But it still persisted in other courts. Both the registrar of the court of Admiralty and the Prize court, and the deputy remembrancer of the Exchequer, invested the suitors' money and pocketed the interest;[3] and the same system was followed in the case of some of the great spending departments of the government. Great sums, for instance, were handed over to the Paymaster of the army, and the Treasurer of the navy, and these officials were free to profit by the use of the money till they were called upon to pay it out.[4] In a lesser degree also the same system was pursued by other receivers of public money. It appears, for instance, that the receivers of land tax were allowed to retain large sums in their hands in order that, by its use, they might supplement their inadequate remuneration.[5]

In the course of the wars of the eighteenth century, the sums which accumulated in the hands of the Paymaster of the army and the Treasurer of the navy were very large—so large that more high-minded statesmen like Chatham,[6] Burke,[7] and Townshend,[8] refused to take what most politicians of the day

[1] Above 489 n. 2. [2] Vol. i 439-440.

[3] Romilly, Memoirs ii 157-159; Romilly said, ibid ii 263, that "Lord Arden, the registrar, whose fees amount to about £12,000 a year, has made £7,000 a year more by interest and profits of suitors' money, and he has sometimes employed above £200,000 of such money at interest."

[4] Fox in 1781, speaking of the large balances which remained in his father's hands, maintained that "if a public accountant held himself able at all times . . . to produce the whole of the public money in his hands, whenever he was called upon so to do, it was in that case a matter of perfect indifference to the public whether he used it for his own advantage or not," Parlt. Hist. xxii 427-428.

[5] Lord North said in 1781 that "a custom as old as the land tax itself, had uniformly prevailed to suffer a considerable portion of the receipt to remain in the hands of the receivers-general, and for this reason, the poundage allowed was not deemed by any means a sufficient remuneration for their trouble," ibid 205; it was for this reason that receiverships of land tax were "sought after by provincial merchants and bankers as providing them with deposits of public money, when, private deposits and savings were as yet insignificant," Namier, Structure of Politics i 58.

[6] Lecky, History of England ii 389. [7] Ibid v 145.

[8] Townshend said in 1781 that he had deposited his balances in the Bank of England till his accounts were passed—"he had been frequently praised, and as

regarded as a legitimate source of profit. But, when this source of profit was attacked, those who benefited by it were able to put up a defence. It was said that the mediæval methods of accounting, which prevailed at the Exchequer, and the formal and rigid technicalities which centuries of practice had superimposed on that system, were the sole reasons why these officials kept these large balances so long in their hands.[1] And there was substance in this defence. Burke said :[2]

> They have in the Exchequer brought rigour and formalism to their ultimate perfection. The process against accountants is so rigorous, and in a manner so unjust, that correctives must, from time to time, be applied to it. These correctives being discretionary, upon the case, and generally remitted by the barons to the lords of the treasury, as the best judges of the reasons for respite, hearings are had ; delays are produced ; and thus the extreme of rigour in office (as is usual in all human affairs) leads to the extreme of laxity. What with the interested delays of the officer ; the ill conceived exactness of the court ; the applications for dispensations from that exactness ; the revival of rigorous process, after the expiration of the time ; and the new rigours producing new applications, and new enlargements of time, such delays happen in the public accounts, that they can scarcely ever be closed.

Accountants, it was said with some reason, could not fairly be asked to pay over their balances till they had received a final *quietus* from the Exchequer. If they did so pay, there was no guarantee that their estates might not be held to be liable for a large sum at a distant date, and their dependents consequently ruined.[3] It was not therefore the covetousness of officials, but the delays of the Exchequer, which caused so much public money to remain in private hands.

Fox, whose father had made a large fortune while he was paymaster, and Burke and Townshend who refused to make a fortune by this means, agreed that this was a valid argument.

often laughed at on this account. Some gentlemen had called his conduct disinterested, and others silly. . . . He did not think he deserved either the one or the other. He had done what he thought his duty and no more," Parlt. Hist. xxii 421.

[1] Fox said in 1781 that the title to estates bought from his father or his father's heirs must be precarious "till the accounts were passed, and he and the other executors and representatives of his father had obtained a quietus," and that therefore it was not safe to pay in anything till that event, Parlt. Hist. xxii 424-425 ; he offered to pay the whole balance into the Bank, but said that the public had no right to handle it till his father's representatives got their quietus, ibid 435 ; Townshend pointed out that he could not force the government to pass his accounts and that therefore "he could not dispose of any part of his property because he could not execute a conveyance sufficient to save the purchaser from an extent of the Crown," ibid 422.

[2] Works ii 93.

[3] Above n. 1 ; when Burke said, Works ii 94, that "terrors and ghosts of unlaid accountants haunt the houses of their children from generation to generation," he was speaking quite accurately, for it appeared in 1783 that some forty-four millions of public money issued to accountants was unaudited, Parlt. Hist. xxiii, 1114 ; for similar delays in Anne's reign see Calendar of Treasury Papers, 1708-1714 xiv.

In fact the slowness of the Exchequer process was a phenomenon of very old standing. In the thirteenth century "sheriffs' heirs were constantly appearing at the Exchequer to pay off their fathers' official debts incurred ten, twenty, or even thirty years earlier. The heirs of . . . a sheriff in Sussex 1255-1257, only cleared off his debt in 1333." [1] Matters had not much improved in the course of four centuries and a half. Fox's father ceased to be paymaster in 1765,[2] and his accounts were not settled in 1783. Chatham ceased to be paymaster in 1755, and his accounts were not settled till 1769.[3] It is obvious therefore that the mediæval methods and the mediæval dilatoriness of the process of the Exchequer were responsible for the large gains made by these officials and for the corresponding loss to the public.

(*c*) *The recruitment of the civil service by favour.*

The mediæval conception of office as property naturally led men to regard the operation of appointing a servant, not as the selection of the person who was most capable of performing a certain set of duties, but as the conferring of a benefit upon some person whom the appointor wished to favour or reward. Throughout the Tudor and Stuart period, and right down to the nineteenth century, this mediæval conception lingered on. In the Tudor and Stuart period the mediæval legislation against the granting of offices for life or lives or in reversion was ignored, or rendered nugatory by a royal dispensation. The Crown continued to grant these offices—often for a money consideration.[4] After the Revolution attempts were made to put a stop to the sale of offices ; [5] and we hear less of the sale of offices by the Crown in the eighteenth century. But they continued to be sold by their holders,[6] and to be granted by the Crown as rewards for political services.[7] The duke of Wellington said, just before the Reform

[1] H. M. Cam, The Hundred and the Hundred Rolls 63-64.

[2] Lecky, History of England iii 233 ; there was a bitter controversy between him and Shelburne as to whether he had or had not promised to resign his office in 1763 when he was made a peer.

[3] Parlt. Hist. xxii 422, 427.

[4] E. F. Churchill, The Crown and its Servants, L.Q.R. xlii 220-225 ; cp. vol. v 353-354, for sales of legal offices.

[5] In 1711 an Order in Council was made forbidding the sale of any places concerning the administration of justice, the revenue, or the administration of the royal household, A. L. Cross, Eighteenth Century Documents, etc., 261-262.

[6] The Commissioners of Public Accounts reported two flagrant instances in 1713 ; first, a series of transactions in 1705 as to the disposal of the office of Auditor of Imprests, Parlt. Hist. vi 1200-1201 ; and secondly, a sale of the office of Register of Seizures ; below 510.

[7] Burke says, Works ii 104, "When we look over this Exchequer list, we find it filled with the descendants of the Walpoles, of the Pelhams, of the Townshends ; names to whom this country owes its liberties, and to whom his Majesty owes his Crown "; Anson, The Crown (3rd ed.) ii Pt. ii 141, speaking of the Auditor of

Act, that members of Parliament claimed the right to dispose of any place which fell vacant within the town or county which they represented ; [1] and the patronage secretary to the Treasury was chiefly employed in computing the amount of patronage which each member's political support was worth.[2] We have seen that Burke refused to recommend the abolition of some of these sinecure offices, on the ground that they gave the Crown power to reward faithful servants of the state.[3] It is therefore not surprising to find that some of the reforms which Burke proposed in 1780 were not carried out when the Whigs took office in 1782.[4]

This idea that a post in the civil service was the grant of a benefit to the servant, was fostered by the haphazard manner in which the departments of government had developed. We have seen that the departments of the secretaries of state developed from the private staff originally employed by the secretaries to help them in their work.[5] Many officials employed extra clerks as they wanted them, and these clerks became part of the staff of the department. Thus the idea developed that the head of a department had the patronage of the department ; so that the heads of departments, new and old, and the higher officials in those departments, acquired, not only the right to collect fees, but also the power of selling places and of rewarding dependents.[6] The extent to which the heads of departments and the higher officials made use of their powers can be seen by the following passage from Pitt's speech, when, in 1783, he proposed a bill for the reform of abuses in the public offices : [7]

Receipt, the Tellers, and the Clerk of the Pells, says, " the names of those who held these offices in 1821 are significant of the objects which they served. The four Tellers were Lord Camden, Lord Bathurst, Mr. Charles Yorke, and Mr. Spencer Perceval; the Clerk of the Pells was Mr. Henry Addington; the Auditor of Receipt was Lord Grenville."

[1] Porritt, The Unreformed House of Commons i 292.

[2] Ibid 302-303. [3] Above 504 and n. 2.

[4] " The duchy of Lancaster, condemned in 1780, was reprieved in 1782 in order that Dunning—of all men—should be granted the Chancellorship. Barré, on appointment to Treasurership of the Navy, defended his department against the suggestion of reform, and it was urged by Burke that with Richmond at the Ordnance, no amendment of that office was any longer necessary," Keir, Economical Reform, L.Q.R. I 373.

[5] Above 497-498.

[6] For an instance of some of the abuses arising from this practice see Walpole, Letters (ed. Toynbee) x 11-12 ; Horace Walpole tried to act fairly by the clerks in his office ; he writes, " I have persuaded Sir Edward to consent that all clerks shall rise by seniority, unless signally unworthy ; it is an encouragement to their zeal ; and surely they who do all the business for us, ought to enjoy the fruits of their labours by being preferred, and having nobody put over their heads," ibid x 199.

[7] Parlt. Hist. xxiii 951 ; for some attempts to stop the practice of bargaining for the surrender of places in the revenue departments see Calendar of Treasury Papers 1714-1719 xviii-xix.

Previous to the existence of the last board of Treasury, a practice had obtained of the occasional superannuation of the stampers of the stamp office, when the commissioners of the Treasury each appointed a stamper, regularly one after the other in turn, as real vacancies happened, or as artificial vacancies were created. It also pretty generally was the practice for each commissioner to appoint one of his own servants, and instantly to grant him a leave of absence, which leave of absence was constantly renewed for six months every half year; so that, in fact, the place was a sinecure to the servants appointed, and all the business was done by a deputy.

Some of the grosser abuses of this system of recruiting civil servants were remedied after the Reform Act of 1832. But as late as 1854 [1] the appointment of civil servants was, to a large extent, vested in the heads and the higher officials of government departments. They could use their powers to benefit their friends or relations or dependents. The system was defended by Sir James Stephen,[2] and by Anthony Trollope,[3] but there is no doubt that it was fruitful of abuses similar in kind (though not so gross in character) to those which existed in the eighteenth century.[4] In the middle of the nineteenth century it could still be said that the public offices were a resource for idle dissipated youths who had in vain tried other occupations.[5] This long-lived system of patronage was not entirely rooted out till, as a result of the Report on the Organization of the Permanent Civil Service,[6] the modern system of recruiting the civil service by competitive examination was introduced in 1870.[7]

[1] Papers on the Reorganization of the Civil Service, Parlt. Papers 1854-1855 vol. xx.

[2] Ibid 71-79.

[3] Trollope admitted its abuses, see his autobiography chap. iii, and his novel *The Three Clerks;* but he did not think that the system of competitive examination alone was best fitted to select the best men—and there perhaps he was right. He pointed out, truly enough, that this patronage was often troublesome to those who possessed it—"a member of the House of Commons, who might chance to have five clerkships to give away in the year, found himself compelled to distribute them among those who sent him to the House. In this there was nothing pleasant to the distributor of patronage. . . . The beggings, the refusings, the jealousies, the correspondence, were simply troublesome."

[4] Mr. Chadwick wrote that a secretary related to him that, "out of three clerks sent to him from the usual sources, there was only one of whom any use whatsoever could be made, and that, of the other two, one came to take his place at the office leading a bulldog on a string"; and that a retired officer had written, "many instances could be given of young men, the sons of respectable parents, who were found unable to read or write, and utterly ignorant of accounts. Two brothers, one almost imbecile, the other much below the average of intellect, long retained appointments, though never equal to higher work than the lowest description of copying. Another young man, on entering, was found unable to number the pages of a volume of official papers beyond 10. It used to be by no means uncommon to have a fine fashionably dressed young man introduced as the junior clerk; on trial he turns out fit for nothing. The head of the department knows from old experience that a representation of this fact to higher quarters would merely draw down ill will upon himself; the first official duty with which the young man is charged is, therefore, to take a month's leave of absence that he may endeavour to learn to write," Parlt. Papers 1854-1855, xx 181 and *note*.

[5] Ibid. [6] Reprinted in ibid 447-469. [7] Anson, The Crown ii Pt. i 237.

(d) Corruption and extravagance.

The system of payment by fees permeated the whole civil service. It was as well known in such new departments as the Secretaries of State's offices, as in the older departments of the revenue and the law. It was the method by which many officials of the local government,[1] and by which the Speaker and other officials of the House of Commons was paid.[2] It was this system which was productive of total or partial sinecures. It was this system which enabled the higher officials to sell places which carried or might carry the right to take fees. A document in the Shelburne MSS.,[3] relating to the customs, tells us that

> every Clerk in the Long Room has 3 or 4 Clerks under him, the disposal of which places ought to be in Treasury Gift, as they get more than £500 per ann. some a £1000 each deputy Clerk ; and, as they have no deputation from the Treasury, they do all they can to cheat the Revenue, as they can't be punished, and it makes this man, who is first Clerk, of more Consequence than a Lord of the Treasury as he sells and disposes of all the Clerks places under him, so that he has it in his power to give or sell a better place than a Commissioner has.

Naturally officials who had paid for their places wished to recoup themselves. Statutes might forbid clerks or other servants to take fees, but these statutes were very little regarded. "In public office," it was said with some justice in 1739, "the officers will extort fees and perquisites from those who are obliged to have recourse to that office, and will detain in their own hands the money that goes through their office as long as they can, in spite of all the care that can be taken to prevent it."[4] Persons were naturally ready to pay for advantages and preferences which these clerks or servants were in a position to give ;[5] and, just as private clerks or servants employed by

[1] Above 230.

[2] Parlt. Hist. viii 921-924 ; Porritt, The Unreformed House of Commons i 471, 490, 503 ; for the list of fees sanctioned in 1700 see Parlt. Hist. viii 1003-1006 ; vol. xi 337-339.

[3] A. L. Cross, Eighteenth Century Documents, etc. 249 ; for an attempt by Horace Walpole to stop abuses in his office of Inspector of Customs see Letters (ed. Toynbee) viii 14-16.

[4] Parlt. Hist. xi 132—the words were spoken more especially of the Prize Office, but it was a fair generalization ; Adam Smith says, Wealth of Nations (Cannan's ed.) ii 380, that "the perquisites of custom house officers are everywhere much greater than their salaries ; and some posts more than double or triple those salaries."

[5] The Lord Mayor of London, in the debate on Pitt's custom house reform bill of 1783, said, with respect to the fees paid to custom house officers, that "the fees that were given were in consideration of the clerks expediting the merchants' business, which it would be impossible for the merchants to do without them ; therefore, as the clerks at the customs attended extra hours to do that business, it was extremely right they should be paid for so doing," Parlt. Hist. xxiii 928 ; but, as Pitt said in 1785, payment by fees established an intercourse which ought to be suppressed, "as the same fee which might be made the motive for despatch, might also, if suitable to the intentions of the donor, be converted into an instrument

the higher officials had a habit of blossoming out into servants of the state,[1] so these payments had a habit of coming to be regarded as legitimate payments sanctioned by custom. In 1783 Pitt stated that the Treasury had enquired of the navy office as to whether any fees were charged in the office. The answer given was that none were charged. But

upon a closer examination of the matter it afterwards came out that, although there were no fees received as such, yet that money to a very considerable amount was received by some of the officers under the name of gifts: thus, for instance, the chief clerk of the navy office received a salary of about £240 or £250 a year; and it turned out that he received no less than £2500 in gifts. Other clerks with smaller salaries received gifts in proportion.[2]

The habit of receiving gifts comes very near to bribery, so that it is not surprising that such a habit resulted in the payment of bribes for connivance at frauds and other illegalities. Pitt, in the same speech, told of a certain contract, the terms of which were so favourable, that there was considerable surprise that the work could be done at the price.

The solution of the enigma was, however, as easy as any solution could be, since it was only recollecting that the officers, who were to pass the contractor's accounts, to see that his contract was duly and faithfully executed, and to report if they found the contrary to be the fact, were each of them in the pay of the contractor.[3]

That such practices could exist undetected and, except in the case of actual corruption, uncensured, is evidence of a lack of control and supervision which led to all kinds of extravagances in the government offices. Pitt said in 1783 that the annual charge for stationery in the government offices was over £18,000, and that of this sum the amount expended by the first lord of the

of delay," Parlt. Hist. xxv 306; obviously it was difficult to distinguish between legitimate and illegitimate services; cp. vol. i 426, vol. ix 366, for similar abuses in the court of Chancery.

[1] Above 497.

[2] Parlt. Hist. xxiii 949; cp. this with Miss Cam's statement, The Hundred and the Hundred Rolls 91, of the thirteenth-century practice—"It was a constant practice among government officials in the Middle Ages to offer to commute some service or grant some exemption from a penalty for money down, and then when the payment had hardened into custom to exact the service . . . and inflict the penalty . . . as if no payment had been made"; this process of creating new customary fees had been going on all through English history and was inevitable so long as officials were paid by fees; in 1781 Lord North said, "At the Reformation, Lord Southampton [the Treasurer] applied for a salary in lieu of those benefits; a salary of £8,000 a year was granted; and since his day the salary had been paid, and the benefits too," Parlt. Hist. xxii 207; in George III's reign the secretaries of state had £3,000 a year each from the secret service fund in addition to their fees, Namier, Structure of Politics i 238; from 1754 to 1756 the sum paid to the duke of Newcastle from this source was £4,600 a year, ibid ii 519.

[3] Parlt. Hist. xxiii 949; in 1713 the Commissioners of Public Accounts reported that the deputy of the Master of the Great Wardrobe got four, five and six per cent from tradesmen who dealt with the office, ibid vi 1204.

Treasury was £1,300, including an item of £350 for whipcord.[1] In the debate on the bill in the House of Lords, Earl Temple " took notice of a saying that was formerly applied to a fine house erected on a certain part of the east coast of the kingdom, viz., that the bricks had been burned with Post Office paper." [2] It was apparently the practice of officials to order supplies, not only of stationery, but of coals, candles, furniture, and other stores for their town and country houses.[3]

All these characteristics of the machinery of central government point to a remarkable degree of autonomy in the officials and departments of which it consisted. The good and bad results of this autonomy must now be considered.

The autonomy of the units of this machinery of central government.

When dealing with the system of local government, we have seen that the autonomy of its units enabled them to develop in many different directions. Many of these units gradually acquired paid staffs ; [4] and the justices of the peace, in addition to their judicial functions, assumed, in town and country alike, administrative and quasi-legislative powers.[5] The same autonomy is characteristic of the units of the central government ; and it was emphasized by the fact, noted as we have seen by Blackstone,[6] that these units of the central government for the most part derived their authority, not from particular powers defined by statute or the common law, but from the wider and more indefinite prerogative of the King. They were subject, as we have seen, to the control of the King, and they were subject to the control of the law as interpreted by the courts.[7] But both these forms of control left them a wide sphere of autonomy, which, in the opinion of many, ought not to be diminished.[8] This autonomy has had a remarkable result upon the development of English public law, which is well summed up in a letter which Lord Melbourne wrote to Queen Victoria in 1841.[9] Lord Melbourne said :

All the political part of the English constitution is fully understood, and distinctly stated in Blackstone and many other books, but the ministerial part, the work of conducting the executive government,

[1] Parlt. Hist. xxiii 953. [2] Ibid 1107. [3] Ibid 952.
[4] Above 228-234. [5] Above 152-153, 234-235. [6] Above 453.
[7] Above 366 ; below 649, 651-652.
[8] In 1783 the House of Lords rejected a public offices regulation bill ; one of the grounds for rejecting it advanced by Lord Stormont was, " that several of the great offices of state had ever been distinct and independent : but this bill gave the Treasury a painful pre-eminence over all of them, and made every one of the rest subject to its control," Parlt. Hist. xxiii 1113.
[9] Letters of Queen Victoria, 1832-1861 i 358, cited by F. G. Port, Administrative Law, 2-3.

has rested so much on practice or usage or understanding, that there is no publication to which reference can be made for the explanation and description of it.

In fact this "ministerial part" of the law has been made by the procedure and practice of the great departments of government. They all developed a technique of their own, which gave rise to a body of rules and principles which, being in their origin "extra-legal," never got into the books. It was a process essentially similar to the process by which the rules of the common law evolved from the practice and the procedure of the common law courts. In both cases rules originating as rules of adjective law gave rise to many rules of substantive law.

The evolution of rules of this kind was necessary for the efficient conduct of the executive government. But there was a danger that rules resulting from the practice of a department might gradually whittle away the liberties of the subject. This danger was prevented by the possibility of appeal to the courts. Both the danger and the efficacy of the safeguard are illustrated by the case of *Entick v. Carrington*[1] and the other "general warrant" cases.[2] We shall see that one of the grounds upon which the argument for the legality of a warrant to search for and seize papers was rested, was the practice of successive secretaries of state since the Revolution[3]—a practice which was found by the jury, in their special verdict in *Entick v. Carrington*, to exist.[4] In fact so certain were the officials in the secretary of state's office of the legality of the practice, that they persuaded the secretary of state not to insert Wilkes's name in the warrant, because to do so would be contrary to the practice of the office.[5] We shall see that Lord Camden's conclusive demonstration of the illegality of this practice showed that the common law was able to protect the subject effectively against bureaucratic tyranny.[6]

The evolution of some rules of practice was, as I have said, necessary to the orderly conduct of government;[7] and it might well be that, in some cases, the restrictions placed by the rules of the common law upon the powers of officials would make it impossible for them to act efficiently. In such cases the proper course was, as Lord Camden pointed out, to invoke the help of the Legislature.[8] As compared with the nineteenth and

[1] (1765) 19 S.T. 1030.
[2] Below 659-661.
[3] Below 668.
[4] 19 S.T. at p. 1035.
[5] Grenville in 1769 said in the House of Commons that the two secretaries of state wished to insert Wilkes's name in the warrant, but that they "were overruled by the lawyers and clerks in the office, who insisted they could not depart from the long-established precedents and course of proceedings," Parlt. Hist. xvi 548-549.
[6] Below 668-671.
[7] Above 498.
[8] Entick v. Carrington (1765) 19 S.T. at p. 1073.

twentieth centuries, the Legislature in the eighteenth century was sparing in the gift of additional powers. But there are instances in which the autonomy of the officials or departments of the central government was added to by the gift of powers (*a*) of the judicial, and (*b*) of the legislative variety.

(*a*) We have seen that the Acts relating to the customs and excise gave judicial powers to the commissioners of customs and excise; that Blackstone, though he admitted the necessity for these powers, said that, in consequence, "the power of these officers of the Crown over the property of the people was increased to a very formidable height"; and that Johnson in his "Dictionary" reflected the opinion generally held of the way in which the commissioners of excise exercised their powers.[1] We have seen also that, though their arbitrary powers were complained of in the House of Commons, they were upheld because it was realized that they were necessary for the efficient collection of the revenue.[2] (*b*) In 1694 [3] the commissioners for regulating hackney coaches were given power to make "orders by laws and ordinances" for the regulation of hackney or stage coaches, and to annex reasonable penalties and forfeitures for their breach. In 1785 [4] the commissioners for stamp duties were given powers to do acts necessary for putting in force the duties imposed on post horses and carriages, and in certain cases to make regulations as to the allowances to be given to the users of carriages. The annual Mutiny Acts and the Navy Discipline Act gave the Crown large powers to legislate for soldiers and sailors.

The danger that these autonomous powers of the officials and departments of the central government would gradually undermine the liberties of the subject was, as we have seen, to a large extent, obviated by the control of the courts. But, in the eighteenth century, their exercise gave rise to other abuses. These abuses were occasioned partly by the insensitiveness of public opinion, which was reflected in the inactivity of the Legislature, and partly by the complexity and the anomalous character of the existing machinery. We have seen that these two causes produced systems of procedure, both at common law and in equity, which were characterized by old rules, the original meaning of which had disappeared; by expedients to evade the consequences of some of these old rules which added materially to the complexities of these systems of procedure; and by extensive technical glosses with which all these rules had been overlaid by the efforts of many generations of judges.[5] We

[1] Above 454 n. 8.
[2] Above 454 n. 9.
[3] 5, 6 William and Mary c. 22 § 15.
[4] 25 George III c. 51 §§ 5, 51.
[5] See vol. ix 246-247, 339-342.

can see the same characteristic in some of the departments of the central government. One striking illustration is the Exchequer procedure of audit as described by Burke.[1] Another is the complex process which had been devised for getting payments from the Exchequer.[2] And it often happened that the extreme technicality of the process defeated its own ends. We have seen that the complications of the Exchequer audit were such that the court could not audit the accounts for years after they had been closed;[3] and it is clear that the machinery for taking the sheriffs' accounts had become so inefficient that the expenses allowed to the sheriffs considerably exceeded the sums for which they were answerable.[4]

Moreover, rules which were being thus gradually made by the practice of a department were necessarily uncertain. They were known neither to the officers in those departments nor,

[1] Above 508.

[2] In 1742, in the report of the committee of secrecy on Walpole's transactions, "John Shepherd being examined, said, that the course of receiving money in the Exchequer is thus: the king issues his sign manual for a certain sum, which is countersigned by the lords of the Treasury, and thereon the lords of the Treasury direct a warrant, signed by them to the auditor of the Exchequer, who on receipt of it makes out an order, signifying that order is taken that payment shall be made; this order is taken to the Treasury, and signed by the lords, and then one of the secretaries of the Treasury signs a letter to the auditor, directing the money to be issued when the before-mentioned sign manual, warrant, and order are produced; that these instruments, together with the letter, are carried to the auditor, who directs the payment of the order to one of the tellers, and then sends it to the clerk of the pells, in order to its being recorded, but keeps the sign manual and the warrant till the next morning, when upon applying to him he delivers them up to the person who is to receive the money, who carries them to the clerk of the pells, when they are compared with the order, and then the clerk of the pells writes upon them the order, under the auditor's direction, 'Recorded such a day': then the order being carried to the tellers, the money is paid," Parlt. Hist. xii 819-820.

[3] Above 509.

[4] The writer of a document in Eighteenth Century Documents, etc. 190-191, says that it might have been expected that the Barons of the Exchequer and the Cursitor Baron would enquire into the defaults of the sheriffs and their own officials—"But the Barons make it an invariable rule to take Notice of nothing but what comes before them in form by motion of Council; and as to the Duty of the Cursitor Baron, it seems to be limited to the apposals of the Sheriffs and to judge of and determine such matters as may be then specially Stated to him by the Sheriff, or such Officers as attend: and as to the other Officers (viz.) the Clerk of the Pipes and both his Secondaries, the Treasurer's Remembrancer, the Comptroller of the Pipe, the foreign Apposer, the Clerk of the Estreats, and the Receiver of the Green Wax, they are all Executed by Deputies; and whatever may be the duty of the Principals (all of whom make perfect Sinecures of their Offices) that of the Deputies seems confined to the Executing such Business, as they are paid for doing, of which that of calling on Defaulters for their Estreat Rolls, or upon the Sheriffs to levy the King's Debts with Diligence seems to be no part"; the result was that for the year 1780 the casual revenue produced only a trifle and the expenses amounted to over £10,000; for the accounts and other documents connected with them see ibid 206-228; as early as 1621 abuses in connection with taking these accounts had been noted, Notestein, Commons Debates 1621 v 16, and a bill had been proposed to regulate the expenses to which sheriffs and others were put by the Exchequer, ibid vii 170-174; this did not pass, but an Act was passed, 21 James I c. 5, to provide that a *Quietus est* should be an absolute discharge to a sheriff.

a fortiori, to the general public. This defect existed to some extent in the nineteenth century.[1] But, in the eighteenth century, the consequences of this uncertainty were aggravated by the system of payment by fees. An extra fee might procure a relaxation of a rule, or an interpretation of a rule favourable to the person paying the fee. We have seen that this abuse was known in the offices of the court of Chancery ;[2] and there is every reason to think that the fees which swelled the regular salaries of officials in many departments of government were similarly earned.[3]

Finally, the autonomy which permitted these departments to develop on their own lines, sometimes left the limits of their functions obscure and led to inter-departmental disputes. There was a dispute of this kind between the Secretary at War and the Commander-in-Chief in 1810 ;[4] and Burke related how "that pert factious fellow, the Duke of Lancaster, . . . presumed to go to law with the King," with the result that the King had to pay the costs of both, to the tune of some £15,000.[5]

This complex and, in many respects, antiquated machinery of central government had certain good points. It was flexible and adaptable to new needs. Its many sinecure offices could be used, as Burke said,[6] to pension deserving servants of the state. The mediæval confusion between property and office, which it maintained, fostered the idea that the tenure of office of a civil servant should be permanent.[7] But, when all these deductions have been made, there is no doubt that the whole system had long

[1] See Report on the Reorganization of the Civil Service, Parlt. Papers, 1854-1855 xx, at pp. 268-269, where Edward Romilly, chairman of the board of Audit, said, "it may well be doubted whether there are not a vast proportion of government offices, and old established offices too, in which it [the drawing up of a printed set of rules for the office] has never been carried into practical effect ; where a newly appointed clerk has no means of ascertaining what are the duties he is expected to perform except by repeated *viva voce* communications with his superior" ; moreover, "it depends on the particular views of the superior officer in question to say what those duties are, the views of one officer being very often widely different from those of another" ; at present the rules "depend on the will and pleasure either of the Treasury or of the political chiefs of those departments which are so presided over."

[2] Vol. i 426.

[3] The term "gifts" for payments made to the clerks in the navy office, above 513, is very significant.

[4] Anson, The Crown ii Pt. ii 228.

[5] Works ii 76 ; it is interesting to note that if the court of the East India Company and the Board of Control differed, it might be necessary for the Board of Control to have recourse to a writ of mandamus to secure obedience to its orders, Camb. Hist. of the Empire iv 315.

[6] Above 504.

[7] The wholesale dismissals in 1761-1762 by Henry Fox and Bute of even the lowest officials who had been appointed by the Whigs, Lecky, History of England iii 226-227, was an exceptional episode ; see E. Hughes, Studies in Administration and Finance 274-279 ; the exclusion of inferior revenue officials from seats in the House of Commons helped to make their posts permanent, ibid 284-285.

stood in need of radical reform. We have seen that Hale had denounced some of its anomalies at the end of the seventeenth century,[1] just as, a little later in the same century, Locke denounced the anomalies of the state of the representation to the House of Commons.[2] And yet no reform in the machinery of central government was attempted until the Rockingham Whigs came into power after the American war of independence; and even Pitt failed to carry a moderate measure of Parliamentary reform.[3] The reason why, during the greater part of the eighteenth century, no reform was attempted either in the machinery of central government, or in the representative system, was due to the same cause—a well-founded fear that a reform in either would destroy the delicate balance of the eighteenth-century constitution. Blackstone, speaking of the technicality of common law procedure, says:[4]

> This intricacy of our legal process will be found, when attentively considered, to be one of those troublesome, but not dangerous, evils which have their root in the frame of our constitution, and which therefore can never be cured without hazarding every thing that is dear to us.

Burke said in 1770:[5]

> Our constitution stands on a nice equipoise, with steep precipices and deep waters on all sides of it. In removing it from a dangerous leaning towards one side, there may be a risk of oversetting it on the other. Every project of a material change in a government so complicated as ours, combined at the same time with external circumstances still more complicated, is a matter full of difficulties; in which a considerate man will not be too ready to decide; a prudent man too ready to undertake; or an honest man too ready to promise.

It is because it was feared that a radical reform would upset the balance between the executive and the legislative parts of the constitution that no reform was attempted.[6] It was not until the Rockingham Whigs realized that the policy of George III was in fact upsetting that balance, and causing it to incline to the side of the Crown, that they became convinced that a reform, which would restore the balance in favour of Parliament, was necessary.

[1] Above 504.

[2] Two Treatises of Government, Bk. II § 157, cited vol. vi 210 n. 4; for other earlier and later recognitions of these anomalies see Porritt, The Unreformed House of Commons i 1-2.

[3] Above 120; below 523-524.

[4] Comm. iii 267.

[5] Thoughts on the Cause of the Present Discontents, Works (Bohn's ed.) i 368.

[6] One of the grounds on which Burke's bill of 1780 was attacked, was that it unduly diminished the influence of the Crown, see Parlt. Hist. xxi 343; it was also compared to an attempt to repaint an old master—the constitution being the work of those masters, "established by the sanction and approbation of admiring ages," ibid 541.

(ii) *The beginnings of reform.*

So long as the Crown and the Whig party worked together little was heard of the defects in the machinery of central government. The vast patronage which it gave to the Crown was in the hands of the Whigs, and helped to consolidate their hold over both the Executive and the Legislature. It is true that the opposition were always ready to inveigh against the influence which the Crown, through this patronage, exercised over Parliament and used in the interest of the Whigs. It was one of the great arguments urged in 1733 against Walpole's excise scheme, that it would increase this influence of the Crown over Parliament. Pulteney said : [1]

It is well known that every one of the public offices have already so many boroughs or corporations which they look on as their properties ; there are some boroughs which may be called Treasury boroughs ; there are others which may be called Admiralty boroughs ; in short, it may be said, that almost the whole towns upon the sea coast are already seized on, and in a manner taken prisoners by the officers of the Crown ; in most of them they have so great an influence, that none can be chosen members of Parliament but such as they are pleased to recommend. But as the customs are confined to our seaports, as they cannot travel far from the coast, therefore this scheme seems to be contrived in order to extend the laws of excise, and thereby to extend the influence of the Crown over all the inland towns and corporations in England. . . . Most of the chief clerks of the Treasury, and other great offices, are already members of this House ; they deserve it. . . . But if this scheme takes place we may in a little time see all the little under clerks of the Treasury, and other offices, members of this House ; we may see them trudging down to this House in the morning, in order to give their votes for imposing taxes upon their fellow subjects ; and in the afternoon attending behind the chair of a chancellor of the exchequer, a secretary of state, or other chief minister : nay, I do not know but some of us may live to see some vain overgrown minister of state driving along the streets, with six members of Parliament behind his coach.

This argument foreshadows the motives which led to the attack by the Rockingham Whigs on the abuses and anomalies of the machinery of central government, which had passed almost unnoticed during the greater part of the eighteenth century. George III had used them, not as George I and George II had used them, in the interests of the Whig party, but to create a party of his own. By these means he had unduly increased the influence of the Crown. In order to diminish it, and in order thereby to restore the balance of the constitution, there must be an inquiry into these abuses and anomalies.[2]

[1] Parlt. Hist. viii 1325-1326.

[2] Thus Burke, speaking of the separate organization of the Duchy of Lancaster said, " this Duchy which is not worth four thousand pounds a year at best to *revenue*, is worth forty or fifty thousand to *influence*," Works ii 76.

Burke's great speech on Economical Reform was, as I have said, the first critical account on a large scale of the machinery of central government. No doubt Burke's immediate object was a purely party object—the diminution of that influence of the Crown which had excluded the Whig party from office; and this was the reason why the legislation of 1782, though important as a beginning, effected very little.[1] But Burke rarely touched a subject, even though he had a purely party object in view, without translating it to a higher sphere of thought, by the historical knowledge and philosophical analysis with which he illumined it. And so this speech may be said to mark the beginning of the period of the reform of the complex machinery of central government.[2] Burke laid down in his speech seven principles upon which reforms ought to be made. Shortly stated they are as follows:[3] (1) "All jurisdictions which furnish more matter of expense, more temptation to oppression, or more means and instruments of corrupt influence, than advantage to justice or political administration, ought to be abolished." (2) That public estates which are useful rather as the means of influencing the tenants upon them, and are a source rather of expense than of revenue, ought to be sold. (3) That offices which are a source of more expense than profit ought to be abolished, and offices ingrafted on others ought to be consolidated. (4) All offices ought to be abolished which prevent a general superintendence of the expenditure of the kingdom. (5) "That it is proper to establish an invariable order in all payments; which will prevent partiality; which will give preference to services, not according to the importunity of the demander, but the rank and order of their utility or their justice." (6) All establishments should be reduced as nearly as possible to certainty. (7) All subordinate treasuries, "as nurseries of mismanagement" ought to be abolished. To carry out these principles he moved for leave to bring in bills first, "for the better regulation of his Majesty's civil establishments and of certain public offices; for the limitation of pensions, and the suppression of sundry useless, expensive, and inconvenient places; and for applying the monies saved thereby to the public service";[4]

[1] "Preoccupied with the diminution of influence—or, in other words with the *parliamentary* aspect of their proposals,—the reformers paid little heed to their *administrative* practicability," Keir, Economical Reform, L.Q.R. I, 370.

[2] "Reform dated from the moment that George III showed his intention to exploit the old abuses for his own ends. The Whigs took alarm, and attempted to become once more the champions of popular rights. Edmund Burke, the great Whig orator, opened, in 1780, the campaign in favour of 'economical reform,' or, as we should term it of administrative reform," Halévy, History of the English People in 1815 (Engl. tr.) 15-16.

[3] Works ii 69-70.

[4] Lord George Gordon opposed the motion for leave to bring in the bill, and, on a division, found himself in a minority of one, Parlt. Hist. xxi 73; for the text of the bill see ibid 111-135.

secondly, for the sale of Crown lands; thirdly, for more perfectly uniting to the Crown the principality of Wales and the county palatine of Chester, and for effecting certain reforms in Wales and Chester; fourthly, for uniting to the Crown the duchy and county palatine of Lancaster, and for effecting certain reforms therein;[1] and fifthly, for uniting to the Crown the duchy of Cornwall and for effecting certain reforms therein.[2] None of these proposed bills became law in 1780. But a beginning was made by the appointment, in that year, of the Public Accounts Committee,[3] which, in the succeeding years, did good work in showing up the anomalies in the financial system of the country, and in making suggestions for its reform.[4] Burke's speech, the advent to power shortly afterwards of the Rockingham Whigs, and the work of the Public Accounts Committee, produced a movement in favour of gradual reform, which is apparent down to the time of the outbreak of the war with revolutionary France.[5]

During the decade 1780-1790 a number of reforms were made. Important reforms were made by Acts of 1782 and 1783, which embodied some of the principles laid down by Burke. One of the Acts of 1782[6] abolished a large number of officials and departments in the royal household and elsewhere;[7] made regulations for the grants of pensions and the issue of secret service money;[8] and established an order according to which payments from the civil list must be made[9]—the salaries of the commissioners of the Treasury being placed last, in order that, as Burke put it, the loss (if any) should fall on those who were responsible for it.[10] As we might expect, the spectacular changes in the royal household, and in other departments of government, effected by this Act struck the eyes of contem-

[1] The introduction of the second, third, and fourth bills was postponed for a week that the King's consent might be got to their introduction, as this was supposed to be necessary in the case of bills which affected the ancient patrimony of the Crown, Burke, Works ii 125.

[2] This bill was withdrawn for the present since it concerned the rights of the Prince of Wales who was a minor, ibid 126.

[3] 20 George III c. 54.

[4] Parlt. Hist. xxii, 204-218; xxv 298-311; a very good account of this committee and its work is given by Keir, Economical Reform, L.Q.R. l, 374-375, 382-384.

[5] See Halévy, op. cit. 18.

[6] 22 George III c. 82.

[7] § 1.

[8] §§ 17-33.

[9] § 31; but the clause was unsuccessful in that it did not prevent fresh accumulations of arrears, Keir, Economical Reform, L.Q.R. l, 371.

[10] "That part of my plan upon which I principally rest . . . is to establish a fixed and invariable order in all its payments, which it shall not be permitted to the first lord of the Treasury, upon any pretence whatsoever, to depart from. I therefore divide the civil list payment into *nine* classes, putting each class forward according to the importance or justice of the demand, and to the inability of the persons entitled to enforce their pretensions," Speech on Economical Reform, Works ii 116-117; the payees were divided into eight classes in the Act of 1782.

porary observers.[1] Less spectacular Acts of 1781 and 1782 reformed the abuse of allowing large sums of money to be accumulated in the hands of the Treasurer of the navy and the Paymaster of the army.[2] Another Act, which provided that in future no patent office in the colonies was to be granted for a longer term than the holder should discharge its duties in person,[3] showed that the public conscience was being awakened to the abuse of granting these offices to residents in Great Britain, who performed their duties by deputy, and frequently farmed them out to the highest bidder.[4] An Act of 1783[5] abolished certain offices in the Exchequer; provided for the abolition of the system of tallies on the death or removal of the two Chamberlains of the Exchequer; reduced the salaries of the Auditor of the Exchequer, the Clerk of the Pells, and the four Tellers to fixed amounts, after the death or removal of the present holders of these offices; and provided that, for the future, offices in the receipt of the Exchequer should only be granted in possession or reversion subject to the provisions of the Act. In 1785 another very salutary reform was made. Commissioners were appointed "to enquire into the fees, gratuities, perquisites, and emoluments which are or have lately been received" in a large number of public offices; "to examine into any abuses which may exist in the same, and to report such observations as shall occur to them for the better conducting and managing the business transacted in the said offices."[6] Two other Acts of the same year made important reforms in the machinery for issuing and auditing the public money. The first of these Acts effected a reform in the department of the Treasurer of the navy, similar to that effected by the Act of 1782 in the department of the Paymaster of the army.[7] Money was no longer to be issued to him, but was to be placed to his account at the Bank of England, and assigned to the particular branches—the pay branch, the cashier's branch, and the victualling branch—for the services for which it was issued. The

[1] "Many persons of high rank reluctantly disappeared from about the King's person at Court, in consequence of Burke's Bill of Reform. The Earl of Darlington quitted the Jewel Office; and Lord Pelham the Great Wardrobe. . . . The Earl of Essex laid down the Stag Hounds; as did Lord Denbigh the Harriers; while the disasters of Saratoga and York Town were thus felt by rebound, through every avenue of St. James's. Gibbon, who had sat at the Board of Trade since 1779 . . . found himself more at leisure to continue that great historical work which he ultimately completed on the banks of the Lake of Geneva," Wraxall, Memoirs ii 179.

[2] 21 George III c. 48; 22 George III c. 81; 23 George III c. 50.

[3] 22 George III c. 75.

[4] See the Preamble to the statute.

[5] 23 George III c. 82.

[6] 25 George III c. 19; a further enquiry was directed in 1787, 27 George III c. 35.

[7] 25 George III c. 31.

second of these Acts abolished the auditors of imprest, provided compensation for the holders of these offices, and enacted that five commissioners with fixed salaries should be appointed to audit the public accounts. They were to have all the powers of the auditors of imprest, and the Treasury was to provide a staff for preparing the accounts.[1] In 1786 commissioners were appointed to enquire into the condition of the woods, forests, and land revenues of the Crown, and to sell fee farm and other unimprovable rents;[2] and in the same year provision was made for ascertaining the fees taken at the receipt of the Exchequer on the issues of money for the payment of certain pensions.[3] In 1787 the consolidated fund was established in accordance with the recommendation of the commissioners for public accounts.[4]

These were the principal reforms effected in the eighteenth century. They covered considerable ground; but they were far from being sufficient; and their provisions were sometimes evaded.[5] They were, however, the most that Parliament could then be persuaded to effect. Even these reforms deprived the ministry of so much patronage that it found it difficult to secure support for its measures.[6] Wraxall thought that these reforms had inflicted indirectly an injury on the constitution, because "the minister, deprived of the means of procuring Parliamentary attendance and support, by conferring places on his adherents, has in many instances been compelled to substitute a far higher remuneration; namely, peerages."[7] He added that Burke, discussing the large augmentation of the peerage made by Pitt, admitted that it was due partly to his reforms.[8] For the same reason these reforms diminished the power of the aristocracy.[9]

[1] 25 George III c. 52. [2] 26 George III c. 87; above 349.
[3] 26 George III c. 99. [4] 27 George III c. 13 §§ 47-52; above 121.

[5] "After the Act of 1782 much of the government patronage was put in trust for the freemen and other voters in these Bossineys and Queenboroughs. Instead of offices being bestowed on freemen, or on members of the corporation who were electors, they were given to the sons and sons-in-law of these voters; or freemen, to save their right to vote, . . . would transfer their government offices to non-voters, who entered into agreements to pay them annuities," Porritt, The Unreformed House of Commons i 75.

[6] See ibid i 221-222, where statistics of the number of office-holders in the House are given.

[7] Memoirs ii 177-178; with this view Lecky, History of England v 293, agrees; he says, "in the first five years of the administration of Pitt forty-eight peers were created, and when he resigned office in 1801 he had created or promoted upwards of 140. They were nearly all men of strong Tory opinions promoted for political services, the vast majority of them were men of no real distinction, and they at once changed the political tendencies and greatly lowered the intellectual level of the assembly to which they were raised."

[8] Wraxall, Memoirs ii 178; in 1783 Pitt said that "he was convinced that it was impossible for the government of a great kingdom to go on, unless it had certain lucrative and honourable situations to bestow on its officers," Parlt. Hist. xxiii 1065.

[9] "The aim of the Whig campaign for the reform of administrative abuses which opened about the year 1780, was to deprive the Crown of one of the sources

If Pitt could have carried a moderate measure of Parliamentary reform, more might have been done. Both the Legislature and the Executive might have been gradually adapted to new conditions, new needs, and new political ideas; for these two sets of reforms were intimately related. But all chance of carrying any such gradual reforms disappeared with the outbreak of the war with France in 1793; and, though a few reforms were effected in the early years of the nineteenth century, they were inadequate to meet the new needs of a rapidly changing society. The result was that when, in 1832 and after, the long-delayed reforms came, they came in so drastic a form that they shattered the eighteenth-century constitution of balanced powers.

We have seen, when dealing with the local government of the eighteenth century, that the legal control of the executive government over the autonomous units of the local government was very small.[1] But we have seen that through the lord lieutenants, who were peers and generally privy councillors, and through justices of the peace, who were generally allied to the nobility, conventional methods of control had been established;[2] and, similarly, that, through the lord lieutenants who were members of the House of Lords, and through the justices of the peace who were members of the House of Commons, conventional links had been established between the local government and Parliament, and, through Parliament, with the Executive.[3] In the same way, if we looked only at the law of the constitution, we should find that the links between the Legislature and the various officials and departments, through which the Crown exercised its prerogatives, were very slender. But here also two conventional and intimately related links had been established. The first link was this complex organization of the machinery of executive government which I have just described. The second link was the constitution of the unreformed House of Commons. It follows that, whether we look at the relations between the local and the central government, or at the relations between the Crown and Parliament, it was through the two Houses of Parliament that a real, though a conventional, connection was established, between the different partners between whom the powers of the state were divided by the law of the eighteenth-century constitution. This consequence followed inevitably from the fact that Parliament was the predominant partner in that constitution. But, though Parliament was the predominant partner, all

of its power, and thereby to fortify indirectly the political privileges of the aristocracy. Since, however, it was that very aristocracy which profited so largely by these abuses, it lost at least as much as the monarchy lost by the progress of administrative reform," Halévy, History of the English People in 1815 (Eng. tr.) 94.

[1] Above 156, 238. [2] Above 238-241. [3] Above 238-239, 241-242.

lawyers and political thinkers agreed that it was only a partner. If a true partnership was to be preserved, the powers of all the partners must be safeguarded. The Crown, the House of Lords, the House of Commons, the Courts, and the units of local government, all had their independent parts to play; and their independence must be preserved.[1] It is only in the light of this theory, which all lawyers and political thinkers of this century treated as axiomatic,[2] that we can understand why abuses which Hale and Locke had denounced at the end of the seventeenth century, were still, to a large extent, unremedied at the beginning of the nineteenth century. These abuses helped to preserve a real partnership, a real balance, between the units of the central and local government which exercised the powers of the state. They were, to use the phrase of Mr. Namier, a necessary part of the structure of politics; and so they remained. Moreover it is only in the light of this theory, and in the light of these abuses, that we can understand the position which the cabinet held in this century. But before we can deal with these matters we must examine the commanding position held by Parliament in the eighteenth-century constitution.

IV

Parliament

Blackstone states clearly the principle that King, Lords, and Commons assembled in Parliament are the sovereign power in the state.[3] Parliament, he says,

> hath sovereign and uncontrolable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate and new model the succession to the Crown; as was done in the reign of Henry VIII and William III. It can alter the established religion of the land. . . . It can change and create afresh even the constitution of the kingdom and of Parliaments themselves; as was done by the Act of Union, and the several statutes for triennial and septennial elections. It can in short do everything which is not naturally impossible: and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament.[4]

[1] Below 717, 720, 722. [2] Below 714-716. [3] Comm. i 147.

[4] Ibid 160-161; the limitation on the power of Parliament attributed to De Lolme, that it "can do everything but make a woman a man, and a man a woman," would perhaps appear inapposite to the Parliament which passed the Sex Disqualification (Removal) Act 1919, 9, 10 George V c. 71.

Hence

an Act of Parliament is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions hereunto belonging, nay even the king himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of Parliament: for it is a maxim in law, that it requires the same strength to dissolve, as to create an obligation.[1]

But, though the theory of sovereignty was an accepted theory in the eighteenth century, and its attribution to the King in Parliament was a well-recognized principle of constitutional law, all the consequences of the theory were not so firmly grasped as they had been grasped by Hobbes in the seventeenth, and as they were grasped by Austin in the nineteenth, century. In fact, just as the continuity of the development of English constitutional law long caused certain doubts as to the extent of the powers inherent in the prerogative,[2] so the same causes caused some hesitation in the acceptance of all the consequences of this theory of the sovereignty of Parliament.

This hesitation is shown (i) by lawyers and (ii) by political thinkers.

(i) There were two reasons why this hesitation was shown by the lawyers. In the first place, no warrant for this theory of sovereignty could be found in the older cases. We have seen that Hale wholly misunderstood Hobbes's theory of sovereignty. He interpreted sovereignty as meaning simply a supremacy, which was not incompatible with the supremacy of Parliament or the law in their several spheres. This sovereignty he attributed to the King; and then proceeded to show that the sovereignty, which Hobbes analysed and explained, was contrary to the rules of English law.[3] Hale represents the traditional point of view of English lawyers, and abundant authority for holding this view could be found in the mediæval [4] and later authorities,[5] and especially in Coke.[6] In the second place, distinct authority against the modern theory of sovereignty could be found not only in the mediæval, but also in the modern books. We have seen that, in the Middle Ages, neither the lawyers nor anyone else would have asserted the power of Parliament to enact a law contravening those moral rules, which were superior to all merely human laws, because they were directly derived from the laws of God or nature.[7] In the sixteenth century St. Germain asserted that Parliament had no direct power over the laws of God or nature—all it could do was " to strengthen them and to make

[1] Comm. i 185-186. [2] Above 364-366. [3] Vol. vi 204-206.
[4] Vol. ii 252-254, 435-436, 441-443. [5] Vol. vi 83-84.
[6] Vol. v 428, 430, 454. [7] Vol. ii 443-444; vol. vi 218-219.

them to be more surely kept." [1] In the seventeenth century Vaughan, C.J., said, "no human authority can make lawful what divine authority hath made unlawful." [2]

(ii) The nature and effects of the Revolution settlement were the reasons why political thinkers hesitated to accept all the consequences of the theory of sovereignty. As the result of that settlement Parliament had become the predominant partner in the constitution. Hence those constitutional rights of the subject, for which Parliament had always stood, assumed a position of greater importance than the theory of sovereignty ; [3] and they were safeguarded by the independence which the Act of Settlement had secured for the judges [4]—the sovereignty of the state was balanced, as Burke said it ought to be balanced, by the judicial authority.[5] This is clear from Locke's *Two Treatises of Government.* In his view it is for the sake of these constitutional rights that political society was founded, so that, if the government fails to safeguard them, it is *ipso facto* dissolved, and can therefore be dismissed.[6] Obviously there is no place in Locke's scheme for any theory of sovereignty.[7] Blackstone combats Locke's view that there is a right to get rid of a government which fails to safeguard those rights for the preservation of which governments were created.[8] But he agreed with Locke that the principal aim of society was to protect the rights of men, which had been given to them by that law of nature [9] which eighteenth-century thinkers had identified with the law of God.[10] Moreover, the division of powers in the English constitution, to which he, in common with many other thinkers English and foreign, ascribed much of the excellence of the

[1] "For commonly the Parliament hath over those laws no direct power: but to strengthen them, and to make them to be more surely kept, it hath good power," Doctor and Student, cap. 10 of the additions to the second Dialogue.

[2] Thomas v. Sorrell (1674) Vaughan at p. 339.

[3] Vol. vi 284-286. [4] Ibid 234.

[5] "Whatever is supreme in a state, ought to have, as much as possible, its judicial authority so constituted as not only not to depend upon it, but in some sort to balance it. It ought to give a security to its justice against its power," French Revolution (7th ed.) 303.

[6] Vol. vi 285 ; this was in harmony with the Whig tradition ; Maitland points out, Collected Works i 25-26, that both Milton and Sydney held the view that laws contrary to the laws of God, reason, or nature ought not to be obeyed ; and that Milton deduced from this premise the conclusion that the execution of Charles I was legal—it was in accordance with the law of God to kill a tyrant, and even a statute giving tyrannical power to the King had no validity.

[7] Vol. vi 286

[8] "No human laws will suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation ; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual," Comm. i 162 ; and see ibid 244-245.

[9] Ibid 124 ; Montesquieu had also come to the same conclusion, probably, like Blackstone, under the influence of Locke, De l'Esprit des Lois, Bk. xi cc. v and vi.

[10] Above 8.

English constitution,[1] tended to prevent the composite sovereign from acting so frequently or so regularly as in those states in which the King had made himself the sovereign. It helped to relegate the theory of sovereignty to the background, and to put the rights of the subject into the foreground of the picture. In fact the theory of sovereignty came very much more naturally to Tories, whose intellectual ancestors were Filmer and the authors who believed in the divine right of kings,[2] than to Whigs whose intellectual ancestors were Locke and the authors who believed in the natural rights of subjects.[3] Halifax was, as we have seen, one of the few Whigs who grasped it and stated it;[4] but Swift,[5] Atterbury[6] and Dr. Johnson[7] state it more clearly than Halifax, and more precisely than Blackstone.

Blackstone's training as a lawyer, his sympathy with the Whig doctrines which had triumphed at the Revolution, and consequently with the theory that men had natural rights given them by a divinely ordained law of nature, made him susceptible to both the legal and the political influences which induced an hesitation to accept all the consequences of the theory of sovereignty. Hence, in the introductory section of the Commentaries there are passages which attribute an over-riding power to the laws of God or nature;[8] which deny that human laws can take away the natural rights of men;[9] which assert, with St. Germain,[10] that, when a human Legislature legislates

[1] Above 417; below 715-716.
[2] Vol. vi 279-280.
[3] Ibid 286-288.
[4] Ibid 280.

[5] The Examiner No. 33; Swift is contrasting the doctrine of passive obedience, which the Whigs erroneously supposed the Tories to hold, with the doctrine of passive obedience which they really held; the doctrine which they really held is in fact the doctrine of sovereignty; he says, "they think that in every government, whether monarchy or republic, there is placed a supreme absolute, unlimited power, to which *passive obedience* is due. That whoever is intrusted [with] the power of making laws, that power is without all bounds; can repeal, or enact at pleasure, whatever laws it thinks fit; and justly demand universal obedience and non-resistance. That among us, as every body knows, this power is lodged in the King or Queen, together with the Lords and Commons of the kingdom; and therefore all decrees, whatsoever made by that power, are to be actively or passively obeyed."

[6] In his defence in the House of Lords he said, "As to the justice of the Legislature, in some respects it hath a greater power than the sovereign Legislature of the universe: for He can do nothing unjust. But, though there are no limits to be set to a Parliament, yet they are generally thought to restrain themselves, to guide their proceedings in criminal cases, according to the known law," Parlt. Hist. viii 287.

[7] Taxation no Tyranny, Works (ed. 1824) xii 180, cited vol. xi 121.

[8] "This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. . . . No human laws are of any validity if contrary to this," Comm. i 41.

[9] "Those rights which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually vested in every man than they are. . . . No human legislature has power to abridge and destroy them, unless the owner shall himself commit some act that amounts to a forfeiture," ibid 54.

[10] Above 527.

on matters provided for by the law of God or nature, it acts only in subordination "to the great law-giver," "so that the declaratory part of the municipal law has no force or operation at all with regard to actions that are naturally and intrinsically right or wrong." [1] And we sometimes hear echoes of these views in Parliament. The debate on the Septennial Act of 1716 shows that many members of the House of Commons thought that the Legislature had no power to repeal the existing Triennial Act, and to prolong its own existence; [2] and that they denied the proposition that there were no legal restrictions on its powers.[3] In the debate on the Regency Bill in 1751 a member denied that Parliament could prolong its existence without the consent of the electors; [4] and in 1753 one of the objections to Lord Hardwicke's Marriage Act was that its provisions, being contrary to the law of God and nature, were of such a nature that no Christian Legislature had power to enact them.[5]

But all these suggested limitations upon the sovereignty of Parliament were as much in the nature of survivals, as the suggestion that the Crown had an extraordinary power to act in an emergency in a manner not otherwise justifiable by the law.[6] They were inconsistent with the theory of sovereignty which had been clearly stated both by Halifax [7] and by Swift,[8] and with Blackstone's own words as to the powers of Parliament and as to the binding force of statutes.[9] They were reminiscent of obsolete legal and political theories, and were introduced by Blackstone only in his introductory sections, which were obviously of a theoretical and academic character. In practice little stress was laid on them except to provide debating points. Substantially the theory of the sovereignty of Parliament was accepted and acted upon. In fact, we shall

[1] Comm. i 54.

[2] Parlt. Hist. vii 317, 334; at p. 339 Sir Robert Raymond, afterwards Chief Justice of the King's Bench, said, "In my poor opinion King, Lords, and Commons can no more continue a Parliament beyond its natural duration than they can make a Parliament."

[3] Mr. Archibald Hutchison, member for Hastings, said, "I will readily agree that the powers given to the people by their representatives are very large, but I can by no means go the length of some gentlemen, to think them absolutely unlimited, or that such ill use may not be made of that power, as to amount to a forfeiture thereof," ibid 349.

[4] William Beckford said, "I do absolutely deny that a Parliament has a legal power and right to prolong the time limited by law, without the consent of the electors," ibid xiv 1055.

[5] William Beckford said, "Whilst we continue Christians, I am of opinion we cannot declare a contract void, which is good and valid by the laws of Christianity," ibid xv 82-83; that such objections were seriously urged can be seen from the fact that Murray, the solicitor-general, dealt in some detail with them, ibid 78.

[6] Above 364-366.

[7] Vol. vi 280 and n. 1.

[8] Examiner No. 33, cited above 529 n. 5.

[9] Above 526, 527.

see that the mismanagement of the controversy with America was largely due to a pedantic use of the theory of the sovereignty of Parliament, to settle the questions at issue between England and her colonies.[1]

In England it has always been in times of political unrest and of acute political controversy that theories of indefeasible rights, limiting the sovereignty of Parliament, have made their appearance.[2] It is not surprising therefore that we hear little of them in England in the eighteenth century, and consequently that, during that century, the sovereignty of Parliament came to be the accepted doctrine.[3] But it is not surprising to find that, outside England, these theories were revived under the pressure of political unrest and political controversy. We shall see that they played some part in the controversies which ended in the war of independence and the foundation of the United States,[4] and in the Irish controversies which centred round the Act of Union and Catholic emancipation. But, whatever might be said in the heat of these controversies, there is no doubt that the English public law of the eighteenth century recognized the King in Parliament as the sovereign power in the English constitution. Of the position of the King I have already spoken, and I shall speak again when I come to consider the relations between Parliament and the central government. At this point I must consider the position in the eighteenth-century constitution of the two Houses of Parliament, both as a whole and separately, and the relations which existed between them.

The Two Houses of Parliament

Of the Septennial Act,[5] and of the effect of the demise of the Crown on the duration of Parliament,[6] I have already spoken. At this point I must say something of the procedure and privileges of Parliament. We shall see that both of these topics, and more especially the topic of procedure, are more important in relation to the House of Commons than in relation to the House of Lords; but that, at some points, the evolution of the law as to privilege affects both Houses.

We have seen that, in the sixteenth and seventeenth centuries,

[1] Vol. xi 124, 126.

[2] Vol. ii 445; vol. iv 205-206; vol. vi 203-204, 224.

[3] Thus it was said in *The Federalist* no. lii that "even in Great Britain, where the principles of political and civil liberty have been most discussed, and where we hear most of the rights of the Constitution, it is maintained, that the authority of Parliament is transcendent, and uncontrollable, as well with regard to the Constitution, as the ordinary objects of Legislative provision. They have accordingly, in several instances, actually changed by Legislative Acts, some of the most fundamental Articles of the Government."

[4] Vol. xi 119-121. [5] Above 63-64. [6] Above 434.

the evolution of a workable procedure, and the insistence on the privileges of Parliament, were the conditions precedent for the successful assertion by Parliament of its position in the state.[1] After the Revolution these two topics—procedure and privilege—though still very important, were ceasing to possess the vital importance which they had possessed earlier in the century. With respect to procedure, we have seen that the leading principles, which were maintained intact down to the changes of the nineteenth century,[2] had been laid down in the earlier part of the seventeenth century[3] and that, in the latter part of the same century, the House of Commons had successfully asserted its right to choose its own Speaker, and its claim that it could only be adjourned by its own act.[4] With respect to privilege, we have seen that, at the end of the seventeenth century, there was some danger that its extent would be so enlarged that it would seriously interfere with the liberties of the subject, and endanger the supremacy of the law.[5] In the eighteenth century the position of Parliament in English public law turns, not so much upon questions of procedure and privilege, as upon the constitution and powers of the House of Commons and the House of Lords, and upon the position which they held in relation to each other. But, before dealing with these matters, I must say a few words on these two topics, procedure and privilege. Some of the developments in the law relating to them indicate both the efficacy of the seventeenth-century principles, and the manner in which those principles were further developed or modified, so as to bring them into accord with the position in the state to which the two Houses of Parliament had attained in the eighteenth century. For this reason a short preliminary survey of the developments in the law upon these two topics, will afford a good introduction to the consideration of the constitution and powers of the House of Commons and the House of Lords, and their relative positions in the eighteenth-century constitution.

Procedure.

"By the end of the reign of James I," says Porritt,[6] "the procedure of the House of Commons had so taken the form in which it came down to the nineteenth century, that could a member of the House of Commons which passed the Reform

[1] Vol. iv 174-180; vol. vi 87-100, 254-258.
[2] Below 533.
[3] Vol. vi 88-92.
[4] Ibid 255-256; it should, however, be noted that in 1715 the House of Commons several times adjourned itself in accordance with a direction to that effect from the King, Parlt. Hist. vii 222-223.
[5] Vol. vi 256-258.
[6] The Unreformed House of Commons i 544.

Act of 1832 have been transported back to the days of the first of the Stuart kings, he would have been at home with the orders and usages, the written and unwritten laws which governed its procedure." In fact, from the Revolution to 1832 there were very few procedural changes of any great importance.[1] In the case of the procedure of Parliament, as in the case of other parts of the public and private law of the English state, the principles established in the seventeenth century were accepted as basic, and submitted to a process of elaboration. Sir Courtenay Ilbert has said : [2]

> It was an age of technicalities. Special pleaders split hairs in judicial proceedings. Conveyancers span out their subtleties to inordinate length in legal chambers. Form was worshipped for its own sake, often to the detriment of substance. The same spirit showed itself in the proceedings of Parliament. It was, as Dr. Redlich has said, the Alexandrian epoch of parliamentary procedure. The principles evolved in creative and revolutionary periods were laboriously reduced to form, and in the process life and growth were often arrested and tendencies were ossified into dogmas. Parliamentary procedure became a mystery, unintelligible except to the initiated, and the officials who formulated the rules were not anxious that their knowledge should be too widely shared. Forms were multiplied. No less than eighteen separate questions, representing successive stages, had to be put and decided on every bill.[3]

It is not surprising that the course of the development of the procedure of Parliament was similar to that of other branches of English law, for we have seen that the manner of its development was very similar to the manner of the development of the common law.[4] Just as the doctrines of the common law, enacted and unenacted, were developed, partly by direct enactment, but chiefly by decided cases ; so the code of Parliamentary procedure in both Houses was developed partly by the direct orders of the House [5] and by the *lex et consuetudo Parliamenti*, but chiefly, in the case of the House of Commons, by the interpretations put upon those orders and the *lex et consuetudo Parliamenti* by the Speaker's rulings. The fact that this development by means of the Speaker's rulings was possible, was due to an evolution in the Speaker's office which was proceeding all through the eighteenth century.

[1] The most important were the change effected in the machinery for trying election disputes by the Grenville Act, below 548-549, and two Standing Orders of 1707 and 1713 as to the proposal of financial measures, and as to the discussion of petitions, Redlich, The Procedure of the House of Commons i 55 n. 1.

[2] Redlich, op. cit. Introd. i xviii.

[3] For these eighteen questions see ibid i 65 n. 1, cited vol. xi 321.

[4] Ibid ii 144-145, cited vol. ii 433 n. 7.

[5] Thus, in 1706-1707, the committee of Privileges made recommendations to the House of Lords as to methods to be adopted for preserving order in the House, House of Lords MSS. vii no. 2374.

We have seen that, at the end of the seventeenth century, the House had asserted its right to choose its Speaker. The Speaker had ceased to be the nominee of the Crown, and a connecting link between the Crown and the House.[1] He had become the nominee of the majority in the House. In the earlier years of the eighteenth century he sometimes spoke in committee ;[2] and he sometimes held, with the Speakership, an office under the Crown—Speaker Compton had been Treasurer to George II when he was Prince of Wales, the King had thoughts of making him Walpole's successor, and Walpole once told Arthur Onslow that the way to the Speakership lay through St. James's Palace.[3] The beginning of the evolution of the non-partisan Speaker of modern times, must be dated from the thirty-three years' tenure of the chair by Arthur Onslow[4] (1727-1761). "No man," said Horace Walpole,[5] "had ever supported with more firmness the privileges of the House, nor sustained the dignity of his office with more authority. His knowledge of the Constitution equalled his attachment to it. To the Crown he behaved with all the decorum of respect, without sacrificing his freedom of speech. Against the encroachments of the House of Peers he was an inflexible champion." He resigned his office of Treasurer of the navy in 1742, because he considered that the tenure of an office under the Crown was compatible neither with the dignity of the office of Speaker, nor with the independence which it should possess—a view which Parliament indorsed, when, in 1790, it fixed the salary of the Speaker at £6,000 a year, and enacted that the Speaker should hold no office of profit under the Crown tenable at the pleasure of the Crown.[6] As it might naturally be supposed, a Speaker who held these views as to the nature of his office always held the balance evenly between the ministry and the opposition—a course of action which was not always pleasing to the ministry.[7]

[1] Vol. vi 255.

[2] Porritt, The Unreformed House of Commons i 446-447.

[3] Ibid 447, 448 ; the last Speaker to hold an office under the Crown was Abbot who held a valuable sinecure on the Irish establishment, ibid 450.

[4] Ibid 449-454 ; Redlich, op. cit. ii 163-164.

[5] Memoirs of George III i 51-52.

[6] 30 George III c. 10 ; apparently this did not apply to sinecure offices not held at the pleasure of the Crown, above n. 3 ; up to that time the Speaker and the other officials of the House were, like all other officials, above 512, paid by fees; for the table of fees paid in 1700 see Parlt. Hist. viii 1003-1006.

[7] Onslow tells us in his autobiographical memoir (Hist. MSS. Comm. 14th Rep. App. Pt. ix 517) that, when Pelham suggested that Onslow should hold office for another term, Onslow said that Pelham must not expect him to act otherwise than he had done before—"which he knew was not always pleasing to ministers" ; the reply was creditable to Pelham ; he said : "I shall as little like as anyone in my station to have a Speaker in set opposition to me, and to measures I may carry on ; but I shall as little like to have a Speaker over complaisant, either to me or them," Porritt, op. cit. i 450.

Onslow's successors did not maintain the high level of ability and impartiality which he reached. Their failure to maintain this standard was partly due to the growth of new questions, which caused a new alignment of parties, and deeper divisions between them; and partly to the policy of George III, which, in this matter as in many others, gave a set-back to normal constitutional development.[1] Fletcher Norton (1770-1780) was a partisan of the opposition;[2] and in 1780 George III procured the election of Cornwall.[3] It is not surprising that in these circumstances, and notwithstanding the Act of 1790, succeeding Speakers felt themselves at liberty to speak in committee, and sometimes showed themselves earnest advocates for particular causes. Abbot (1802-1817) was a strenuous opponent of Catholic emancipation, and brought upon himself a motion of censure for the manner in which he referred to the rejection of the Catholic Relief Bill in his address to the Regent, when, at the close of the session, he presented the money bill at the bar of the House of Lords.[4] The motion was lost; but the discussion of the matter in and out of Parliament, to which it gave rise, showed that public opinion demanded that the Speaker should not be a partisan.[5] It was not, however, till the Speakership of Shaw Lefevre (1839-1857) that the office was wholly dissociated from all connection with a particular party, and that its holders attained the standard set by Onslow.[6]

The character of the Speaker's office has always demanded from its holder certain judicial qualities;[7] for he must apply the rules of procedure contained in the orders of the House, and in the *lex et consuetudo Parliamenti*, to the facts arising in the course of the debates and other proceedings—just as a judge must apply the rules of the statute and common law to the facts of the cases which come before him.[8] It was the rulings of

[1] Porritt, op. cit. i 454-457.

[2] Ibid 459; he sometimes spoke in debates, e.g. he spoke in 1780 on Dunning's motions as to the influence of the Crown, Parlt. Hist. xxi 355, and on the bill to appoint commissioners to examine the public accounts, ibid 561; for an account of him as a lawyer see vol. xii 560-562.

[3] Porritt, op. cit. i 459-460; his election was carried against Norton by two hundred and three votes to one hundred and thirty-four.

[4] Ibid 463-469. [5] Ibid 469-476. [6] Ibid 480.

[7] Hooker in Elizabeth's reign said that the Speaker, "during the time of the Parliament ought to sequester himself from dealing or intermeddling in any public or private affairs, and dedicate and bend himself wholly to serve his office and function," Mountmorres, Ancient Irish Parliaments i 120-121, cited Porritt, op. cit. 445; for Hooker see ibid 43.

[8] "It is not merely a use of analogy to conceive of the Speaker in the modern House of Commons as above all things a judge, nay as the sole judge of parliamentary law. . . . It is only when the Speaker is looked upon as a judge that we reach a complete understanding of his attitude to the rules on the one hand and to the House on the other. As the law stands above judge and parties, so do settled tradition and the unwritten standards of parliamentary law stand above the Speaker

Arthur Onslow, collected and edited by Hatsell, the Clerk of the House of Commons 1768-1797, which elaborated the principles of procedure inherited by the House of Commons from the seventeenth century, and gave them the form which they retained till 1832.

We have seen that the position of the House of Commons in relation to the Crown, and the constitutional controversies of the seventeenth century, had had the results of making its procedure a procedure of opposition, designed to protect a minority.[1] Onslow had fully grasped this fundamental characteristic of its procedure, and his rulings did much to preserve it. "Mr. Onslow," says Hatsell,[2]

> used frequently to assign another reason for adhering strictly to the rules and orders of the House: He said it was a maxim he had often heard, when he was a young man, from old and experienced members "that nothing tended more to throw power into the hands of Administration, and those who acted with the majority of the House of Commons, than a neglect of, or a departure from, these rules—that the forms of proceeding, as instituted by our ancestors, operated as a check and controul on the actions of ministers; and that they were in many instances a shelter and protection to the minority against the attempts of power."

Onslow recognized that the minority needed this protection. "Ministers," he said,[3] "seldom love Parliament, never bring business there for counsel, but to carry points that must have the authority of the Legislature; and in order to carry such points must previously strengthen themselves there by collecting all the force they can get for it."

It is obvious that the development of the procedure of the House of Commons on these historic lines had its dangers. There was the risk that business would be held up—a risk alluded to by Horace Walpole when he said that Onslow "was so minutely attached to forms that it often made him troublesome in matters of higher moment."[4] There was also the risk that the forms of the House would be made an instrument of obstruction. But in fact these risks did not materialize in the eighteenth century. The number of members who wished to speak was not large;[5] their speeches, until the growth of the opposition to Lord North's

and the House. To apply this law, to deal with wise discrimination between the House and the individual member, and between party and party, to do this according to the rules and in the spirit of parliamentary law is the essential, the crowning task of the Speaker," Redlich, op. cit. ii 149-150.

[1] Vol. vi 91 and n. 2.

[2] Precedents of Proceedings in the House of Commons ii 171-172, cited Redlich, op. cit. i 55-56.

[3] Hist. MSS. Comm. 14th Rep. App. Pt. ix 460, cited Porritt, op. cit. i 449.

[4] Memoirs of George III i 52.

[5] Redlich, op. cit. i 64, 68 n. 1, citing Townsend, History of the House of Commons ii 390.

government, were not remarkable for their length ; [1] it was not a century of great legislative changes—and so, for all these reasons, the business of the House was not congested. There are very few instances in which the forms of the House were used for the purposes of obstruction.[2] This absence of obstruction was due partly to the absence of deep lines of cleavage between the parties during the greater part of the century ; [3] partly to the homogeneous character of the composition of the Houses [4]—there was a gentleman's understanding that the game must be played fairly ; [5] and partly to the fact that the House was composed of men of affairs who realized that the King's government must be carried on.

All parties and sections of the whole governing class united in maintaining as the cardinal conception of the state that the machine of government must never be brought to a stop, that the function of Parliament must never be risked in the struggles of party.[6]

Thus the dangers inherent in this development of the procedure of the House of Commons were not so great as it might at first sight appear ; and, even if they had been greater, it would, in the eighteenth century, have been worth while to risk them, for the following reason : We shall see that the constitution of both the Houses of Parliament, and more especially of the House of Commons, gave enormous power to the party in office.[7] In George III's reign, when the King was making his bid for power, the small minority, who were advocating necessary reforms, might have been wholly suppressed, if they had not been helped by the procedure of the House.[8]

Without its aid public opinion and the aspirations of the unenfranchised masses of the nation would have sought in vain to find

[1] Redlich, op. cit. i 68 n. 1.

[2] Redlich, ibid 138 n. 2, thinks that the length of the struggle over the Grand Remonstrance in 1641, vol. vi 120, was due to " the intentional use of obstructive tactics " ; he points out that the next case occurred in 1771 ; in that year, in a debate as to allowing the reports of parliamentary proceedings to be published in newspapers, the minority led by Burke called, in one sitting, for twenty-three divisions, ibid ; see Parlt. Hist. xvii 75-96.

[3] Above 112 ; below 558.

[4] Below 628-629.

[5] " The struggle became a kind of political game, with the attainment of supreme power in the state for prize, and membership of the ruling class of society for an indispensable qualification. And, as in the case of the old English popular games, there would grow up spontaneously the notion of the strict inviolability of the rules of fighting and of play," Redlich, op. cit. i 63.

[6] Ibid 68; Redlich, ibid 69, points out that, " in the great political crisis which took place a few years after the first Reform Bill, there was a strong temptation placed in the way of the Tories, who had become used to power, to throw the Liberal party from the saddle, by a policy of passive resistance : but the old Duke of Wellington, a typical Englishman, resisted it, remarking laconically, ' the Queen's government must be carried on '."

[7] Below 580.

[8] See above 418-419 for Blackstone's views on this matter which coincided with those of Burke and others.

expression in Parliament, and the voice of the few theorists among the ruling classes who espoused their cause would have been silenced.[1]

Fox was right when he said in 1789 that a neglect to observe the forms of Parliament would destroy its legislative authority, be contrary to the spirit of the constitution, and subversive of "the dearest privileges of the nation."[2]

Thus the procedure of the House of Commons helped to make the House representative of all the politically conscious classes of the nation,[3] and to keep it in touch, throughout the century, with the public opinion of the day.[4] It went far to correct those defects and anomalies of its constitution which, in the early years of George III's reign, were tending to make it irresponsive to national feeling, and blind to trend of public opinion.[5] Because this system of procedure made it possible for the advocates of reforms to get a hearing, to convert Parliament, and so to effect necessary reforms in a constitutional manner, it preserved the national pride in Parliament, and in the constitution of which Parliament was the centre. It was this national pride in the constitution which made it possible for the men who worked the system of local and central government, to keep the peace, and to suppress outbreaks of disorder, by means of a ludicrously inefficient police force, and an army which could only be employed under conditions which were strictly defined by the law.[6] The responsiveness of the House of Commons to public opinion, which it owed largely to its system of procedure, tended to foster the same qualities in the House of Lords. In fact there were times—notably during the agitation over the Middlesex election and during the American war of independence—when that House was quite as responsive to public opinion as the House of Commons.[7] We shall now see that this responsiveness to public opinion, which sometimes a minority and sometimes a majority

[1] Redlich, op. cit. i 56. [2] Parlt. Hist. xxvi 659-660.

[3] "The wishes of the country made themselves felt at Westminster as effectively as under the most democratic form of government. The fate of the Excise Bill, the declaration of war with Spain in spite of all Walpole's efforts; and the final triumph of Pitt's policy over the determined opposition of the king and all office holders, prove this incontestably," Basil Williams, E.H.R. xii 449.

[4] Porritt, The Unreformed House of Commons i 273-282, has proved that both the government and individual members were obliged to pay much attention to public opinion all through the century; above 77, 102, 110; in 1740 Lord Gage, in a debate on a place bill, said, "I am not ashamed to own that the instructions I have in my pocket, will weigh with me, and do not in the least doubt that those gentlemen who oppose this bill, will find the weight of their's in their pockets," Parlt. Hist. xi 380; for the representations sent by constituents to members on the fall of Walpole see Parlt. Hist. xii 416-427; see below 597-600 for the views expressed as to the attitude members should adopt with regard to these instructions.

[5] Above 101; below 583.

[6] Above 144; below 705-706; Halévy, History of the English People in 1815 38-39.

[7] Above 100; below 544, 616.

of both Houses showed all through the century, is illustrated by the developments in the law as to their privileges.

Privilege.

We have seen that the decisions of Holt, C.J., and the House of Lords had established the proposition that, though the propriety of the exercise by each House of one of its established privileges is a question, not for the courts, but for each House alone; the question whether or not a privilege exists is a question of law, which must be decided, not by the resolution of each House, but by the courts.[1] But the House of Commons had never acquiesced in the decisions of the courts in the case of *Ashby v. White*[2] and *Paty's Case*,[3] in which these principles had been in effect laid down. The seventeenth-century struggles over privilege, and the importance to the House of Commons of maintaining it, were causes which tended to make the House exaggerate its extent, and resent the control of the law; and it more especially resented the control of the law, when the law was laid down by a rival House, mainly composed of non-lawyers, which, it was feared, would exercise its jurisdiction on political grounds. Largely for this reason, the House of Commons wished "to keep questions of privilege entirely outside the cognizance of the common law," because, if they were within the cognizance of the common law, they might eventually come up for adjudication by the rival House on a writ of error.[4] And so, although Holt's decision had made it quite clear that the question of the existence of a privilege is a matter of law to be settled by the courts, the recognition of that principle by the House of Commons, and, as the result of the attitude of the House, by the legal profession, was delayed until it was put beyond all doubt by the decisions of the nineteenth century.[5]

Even if the House of Commons had been inclined to acquiesce in Holt's decisions, they would have found it difficult to apply the law there laid down to particular cases. In the first place the earlier cases, from whch they drew their precedents, contained no hint of the principle upon which those decisions rested —the principle that there is a fundamental distinction between a resolution of the House as to the exercise of an undoubted privilege, and a resolution of the House as to the existence of a

[1] Vol. i 393-394; vol. vi 268-272.

[2] (1704) 2 Ld. Raym. 938; 14 S.T. 695.

[3] (1705) 2 Ld. Raym. 1105; in effect Holt C.J. upheld the same view as against the House of Lords in Rex v. Knollys (1695) 1 Ld. Raym. 10; vol. vi 270-271.

[4] Turberville, The House of Lords in the XVIIIth Century 9.

[5] Burdett v. Abbot (1811) 14 East. 1; Stockdale v. Hansard (1839) 9 Ad. and E. 1; Case of the Sheriff of Middlesex (1840) 11 Ad. and E. 272; Bradlaugh v. Gossett (1884) 12 Q.B.D. 271.

disputed privilege. In the second place, it is not always easy to apply this principle correctly to a given state of facts; and the difficulty was increased by the fact that it was those cases which turned upon a dispute as to the existence of a privilege which aroused the passions of the House, and led it to act precipitately and unjudicially. These difficulties were strikingly illustrated by the disputes which arose out of the action which the House took with respect to Wilkes in 1769.[1]

In 1769 the House came to two resolutions. First, it resolved that because Wilkes had been expelled he was incapable of being re-elected. Secondly it declared that Colonel Luttrell, Wilkes's opponent, who had a minority of votes, was duly elected.[2] Obviously the legality of these two resolutions depended on the question whether the House could by resolution declare that a candidate was incapable of being elected. If it had this power, it might fairly be argued that the votes given to Wilkes were thrown away, that the votes given to his opponent could alone be counted, and that therefore he was duly elected. If it had not this power, the votes given to Wilkes were good votes, and the resolution that his opponent was elected was clearly wrong.

The question whether or not the House had this power was by no means an easy question to answer. Both those who asserted and those who denied the authority of the House were able to cite authority for their views. Blackstone, in the first edition of his Commentaries, had not stated that a vote of the House could render a candidate incapable of being elected; and, after enumerating various incapacities, he had said that, subject to them, "every subject of the realm is eligible of common right."[3] Naturally, to his confusion, this passage was quoted against him, when, in the House of Commons, he upheld the view that the House could, by resolution, incapacitate a candidate from sitting in that Parliament.[4] But he returned to the charge, and wrote a learned pamphlet to prove that the House of Commons had the power to incapacitate a member for the duration of a Parliament.[5] His main contention was that the decisions of the House of Commons laid down by it in the course of its jurisdiction, first over its own members, and secondly over all matters connected with elections, were, by the law and custom of Parliament, as much a part of the law of the land as the decisions of any other

[1] Erskine May, Constitutional History ii 13-26.
[2] Ibid 14-15.
[3] Comm. i 176.
[4] Letters of Junius no. 18; Foss, Judges viii 248.
[5] The Case of the late Election for the County of Middlesex; this pamphlet is printed at pp. 57-119 of a number of tracts, entitled an Appendix to Sir William Blackstone's Commentaries, published by Robert Bell, Philadelphia 1773.

court.[1] In the exercise of the first of these kinds of jurisdiction the House of Commons could expel its members ; and expulsion, as distinct from suspension, was equivalent to incapacitation.[2] Moreover, there were many instances in which the House had declared certain persons, such as aliens or the clergy, incapable of being elected.[3] In the exercise of the second of these kinds of jurisdiction the House was the sole judge of all questions arising in the course of, or as the consequence of, elections to the House. Its jurisdiction extended not only to the decisions of disputed returns, but also to the decision of the question whether persons were entitled to the franchise.[4] The correctness of the judgment of Holt, C.J., and the House of Lords in *Ashby v. White*[5] was questioned ;[6] and precedents were cited of the determination of the right to vote by the House of Commons, though there was no dispute as to the right of rival candidates to be elected.[7]

Blackstone found it necessary to make two additions in the later editions of the first volume of his Commentaries, in order to give effect to this view.[8] In these editions he cites as the authorities for it the following authorities :[9] First, the sentence passed by the House of Lords on Bacon[10] and Middlesex,[11] which declared them incapable of ever again sitting in Parliament. Secondly, he cited *Hall's Case* in 1580, in which the House of Commons had declared Hall incapable of sitting during the present Parliament ;[12] *Sawyer's Case* in 1624, in which the House

[1] At pp. 64-69, 75-95. [2] At p. 70. [3] At pp. 96-101.
[4] At pp. 90-91. [5] (1704) 2 Ld. Raym. 938.
[6] At pp. 87-90 ; with respect to Holt C. J. he said, "the three judges from whom he differed have ever been reputed among the most learned and able of the profession : and perhaps some of the arguments of this great man, on this occasion, will be found to depend on those hair-breadth distinctions, which however they may show subtlety of argumentation, do not always tend to the establishment of truth" ; with respect to the decision of the House of Lords he said, "an insatiate appetite for power is natural to all bodies of men ; and if the judgment of that august assembly may be presumed to have less authority in one case than another, it must certainly have the least weight in this, wherein their judgment directly tended to enlarge their own jurisdiction, and ultimately to give them a manifest ascendency over the third estate in the kingdom, and consequently over the liberties of the people of Great Britain."
[7] At pp. 90-91.
[8] At p. 163 he added the following sentence : "and there are not only those standing incapacities ; but if any person is made a peer by the King, or elected to serve in the House of Commons by the people, yet may the respective Houses upon complaint of any crimes in such persons, and proof thereof, adjudge him disabled and incapable to sit as a member : and that by the law and custom of Parliament" ; at p. 176 to the sentence cited above 544 he added, "though there are instances, wherein persons in particular circumstances have forfeited that common right, and have been declared ineligible *for that Parliament* by a vote of the House of Commons, or *for ever* by an Act of the Legislature."
[9] Comm. i 163 n. (*m*). [10] Lords' Journals iii 106, May 3 1621.
[11] Ibid 383, May 13 1624.
[12] Commons' Journals i 126, 127, Feb. 14 1580.

had declared Sawyer unworthy to serve as a Member of Parliament;[1] a resolution of 1640, which declared that monopolists and projectors were incapable of being members;[2] a resolution of 1676 in which Strickland was declared incapable of being a member because he was a popish recusant;[3] and a resolution of 1711 which declared that, since Sir Robert Walpole had been found guilty of corruption, he was incapable of sitting during the present Parliament.[4] These authorities, and the reasoning of Blackstone's pamphlet, convinced Christian, Blackstone's editor, that Blackstone was right in amending the subsequent editions of his Commentaries,[5] and in stating that a resolution of the House could incapacitate a person from election during that Parliament.[6] They seem also to have induced Lord Mansfield to adhere, though with some hesitation, to this view.[7]

But these precedents were by no means decisive in favour of this view of the law. First, the fact that the House of Lords made incapacity a part of the sentence upon a person found guilty on an impeachment, is hardly an authority for the creation of an incapacity by a resolution of the House of Commons, without any preliminary judicial proceeding. Secondly, as Chatham pointed out, there was a distinction between the expulsion and incapacitation of a peer, and the expulsion and incapacitation of a member of the House of Commons after a re-election. A member of the House of Commons, by his re-election, gets a fresh title: there is no fresh title for a peer.[8] Thirdly, all but one of the precedents taken from the Commons' Journals come from the period before the relations between privilege and the law had been elucidated by Holt; and from a period when the struggle with the Crown made it necessary for the House of Commons to insist upon, and sometimes to exaggerate, its claims of privilege.[9] The one precedent of the eighteenth century, which gave support to Blackstone's view of the law, was the case of Sir Robert Walpole; and it should be noted that, when he was re-elected, the House did not declare his opponent elected, but

[1] Commons' Journals i 907, June 21 1628.
[2] Ibid ii 24, November 9 1640.
[3] Ibid ix 393, March 6 1676.
[4] Ibid xvii 128, March 6 1711.
[5] Comm. i 163 n. (16), 176 n. (43).
[6] Above 541 n. 8.

[7] In 1770 he refused to give any opinion as to the legality of the Middlesex election, but said that the House of Commons had the sole right to decide election disputes, and that therefore it was not for the House of Lords to interfere, Parlt. Hist. xvi 653-655; later in the same year, ibid 959-961, he asserted that members of the House of Commons had often been expelled, that the candidates had never stood again "resting content with the expulsatory power of the House," and that, as the votes for Wilkes were thrown away, Luttrell had a clear majority—in effect he agreed with Blackstone's view.

[8] "These lords received no fresh title by birth or patent, and therefore could not claim a seat after the first expulsion. Wilkes may, perhaps, complain that he was unjustly expelled; but the chief subject of the nation's complaint is that he was rejected after his re-election," Parlt. Hist. xvii 218.

[9] Vol. vi 268-270.

ordered a new election.[1] Blackstone's explanation of this fact is probably right.[2] "It was not then clear," he says, "what the result of such a re-election was, and it was fair to the electors to give them the chance to make another choice." But it was clear in Wilkes's case, from the votes of the House,[3] from decisions of the House,[4] and from the decisions of the courts in the case of municipal elections,[5] that, if votes were given to an incapable person, they would be thrown away. The electors therefore knew the consequences of voting for Wilkes, so that there was nothing unjust in the decision of the House to ignore their votes and declare Luttrell elected.

It was hardly to be expected that in 1711 the House of Commons would recognize the authority of the decision in *Ashby v. White;* and in 1769 Blackstone was obliged to speak for the government. The underlying fallacy of his argument is his misunderstanding of the principle laid down in *Ashby v. White*, as to the limits placed by the law upon the extent of the privilege of Parliament. In fact, the acceptance of his argument would have left it very doubtful whether there were any legal limitations upon the power of the House to extend its privileges by its own resolutions. In the debate in the House of Commons in 1769 serjeant Glyn's argument was based upon the principle, laid down by Holt, C.J., in *Ashby v. White*, that, since the privileges of Parliament were a part of the law, they must be defined by the law, and not by the resolutions of the House. He said :[6]

> The disqualification of Mr. Wilkes not being the law of the land, the freeholders of Middlesex were not obliged to take notice of it. That the disqualifications of bodies of men, as clergy, aliens, etc., were all either by express laws, or by implication from the common law, and that the votes of the House to that effect were only declaratory, but not enacting. That undoubtedly the House had a jurisdiction over its own members, and were judges of the rights of electors, but such judgments must be according to law, a natural consequence of every court of judicature in this kingdom. That the rights of the freeholders of Middlesex, as well as the right of every citizen or burgess, was an inherent right in them, not derived from the House of Commons, and therefore could not be taken away from them by the House, except in cases when, offending against law, they had forfeited a right to such privileges.

In the same debate Grenville[7] based his whole argument to the same effect upon the cases of *Rex v. Knollys*[8] and *Ashby v.*

[1] Commons' Journals xvii 128, March 6 1711.
[2] The Case of the late Election 111-113. [3] Ibid 112.
[4] Citing the case of Comyns in 1715, and the case of Ongley in 1727, ibid 105-106.
[5] Ibid 106-109.
[6] Parlt. Hist. xvi 587; in 1771 he adduced the same arguments at greater length, ibid xvii 131-134.
[7] Ibid xvi 587; his speech is there said to have been "one of the best speeches that had been made in the House of Commons for many years."
[8] (1695) 1 Ld. Raym. 10; vol. vi 270.

White.[1] In the following year (1770) a minority in the House of Lords based its objections to the action of the House of Commons on the same ground. Chatham said that the House of Commons, "under pretence of declaring the law, had made a law, and united in the same persons the office of legislator and judge"; [2] and, later in the same year, Camden said that "The judgment passed upon the Middlesex election had given the constitution a more dangerous wound than any which were given during the twelve years' absence of Parliament in the reign of Charles I." [3]

This view of the law is that which is accepted to-day; and for much the same reasons as those advanced by Holt, C.J., and serjeant Glyn.[4] In fact it was so obviously correct that, after many efforts in and out of Parliament, the House of Commons was in 1782 at length induced to expunge from its records all its declarations, orders, and resolutions touching the Middlesex election.[5] So ended what Burke truly and wittily called "a tragi-comedy acted by 'his Majesty's servants,' at the desire of several 'persons of quality,' for the benefit of Mr. Wilkes, and at the expense of the constitution." [6]

Cases, such as the *Wilkes' Case*, which showed that the Houses of Parliament were prepared to assert, in the name of privilege, a power to override the law, were the most dangerous from the point of view of constitutional principle. But there were two other classes of cases in which both Houses, in the exercise of their undoubted privileges, inflicted considerable injustice on the private citizen. In the first class of these cases the injustice was due to the arbitrary manner in which they exercised their privileges. In the second class of cases it was due partly to the extent of their privileges, and partly to the lengthening of the time during which Parliament was in session.

(i) There is no doubt that both Houses were inclined to make a very arbitrary use of their privileges. Perhaps the House of

[1] (1704) 2 Ld. Raym. 938; vol. vi 271.

[2] Parlt. Hist. xvi 659. [3] Ibid 964.

[4] "No doubt the rights of the burgesses of Northampton to be represented in Parliament, and the right of their duly elected representative to sit and vote in Parliament . . . are in the most emphatic sense legal rights, legal rights of the highest importance, and in the strictest sense of the words. Some of these rights are to be exercised out of Parliament, others within the walls of the House of Commons. Those which are to be exercised out of Parliament are under the protection of this Court, which, as has been shown in many cases, will apply proper remedies if they are in any way invaded, and will in doing so be bound, not by resolutions of either House of Parliament, but by its own judgment as to the law of the land, of which the privileges of Parliament form a part. Others must be exercised, if at all, within the walls of the House of Commons; and it seems to me that, from the nature of the case, such rights must be dependent upon the resolutions of the House," Bradlaugh v. Gossett (1884) 12 Q.B.D. at pp. 285-286, *per* Stephen J.

[5] Erskine May, Constitutional History ii 26.

[6] Parlt. Hist. xvi 546.

Lords was the worst offender.[1] For instance, they often abused their privilege of giving their servants protection from arrest in civil suits.[2] In 1692-1693 George Wilson, in a petition to the House, stated that in the town of Hornby, where Lord Morley resided, " no sheriff's officer dare attempt to arrest any inhabitant without his lordship's licence first had, several bailiffs who have attempted to do so having been whipped and put in the stocks by his lordship's order " ; and that the town of Hornby was, as the result of Lord Morley's lavish distribution of protections, " called Whitefriars and the men the blackguards." [3] Macaulay's description of the use made by peers of their privileges is fully borne out by the authorities ; [4] and though, in the course of the eighteenth century, the House tried to stop the grosser abuses,[5] it is well to remember that Lord Halifax used his privilege as a peer to impede Wilkes's action against him for his arrest under a warrant which was illegal because it was general.[6] The House of Commons was also guilty of similar abuses of privilege. They used it to punish offences, such as trespass or poaching, against individual members ; [7] " and until well on in the last century of the unreformed House of Commons, men procured election to the House in order that they might evade their creditors, and keep outside the debtors' prisons." [8] On the other hand, in 1718-1724, they attempted to put an end to the abuse of giving protections.[9] But when, as in the case of

[1] Vol. i 391 ; Turberville, The House of Lords in the Reign of William III 72-84 ; there are many instances in the House of Lords MSS. see e.g. vol. vi nos. 2110 and 2193.

[2] Turberville, op. cit. 78.

[3] House of Lords MSS. (1692-1693) no. 514 p. 7, cited Turberville, op. cit. 80 ; Mr. Turberville says, citing House of Lords MSS. (1695-1697) no. 1098, p. 380, that " James Howard, a relation of the Duke of Norfolk, though a man of substance, for years made use of illegal means to defraud his creditors, and when at last a warrant for arrest had been obtained, produced a protection from his noble relative and was discharged. There was indeed a potential Whitefriars on every nobleman's domain."

[4] Cited vol. vi 256 n. 8.

[5] Turberville, The House of Lords in the Reign of William III 78-79, 81-82 ; in 1725 the earl of Suffolk was committed to the Tower " for having given several written protections in breach of the standing orders, and to the dishonour of the House, as likewise to the obstruction of public justice," Parlt. Hist. viii 414.

[6] Walpole, Memoirs of George III ii 110.

[7] Mahon, History of England 1713-1783 iv 20, speaking of George II's reign, says, " on one occasion it was voted a breach of privilege to have killed a great number of rabbits from the warren of Lord Galway a member. Another time the fish of Mr. Jolliffe were honoured with a like august protection. The same never-failing shield of privilege was thrown before the trees of Mr. Hungerford, the coals of Mr. Ward, and the lead of Sir Robert Grosvenor. The persons of one member's porter, and of another member's footman were held to be as sacred and inviolable as the persons of the members themselves."

[8] Porritt, The Unreformed House of Commons i 571.

[9] The standing order of 1718 declared all protections void, forbade their grant for the future, and provided that if they were granted the members giving them should make satisfaction to the party injured, and be liable to the censure of the House ; this order was reprinted and published in 1724, Parlt. Hist. viii 379.

Wilkes, the passions of the House were aroused, they used their privileges without any regard to justice. The immediate cause of Wilkes's expulsion in 1768 was his publication of a comment on a letter of Lord Weymouth to the Surrey magistrates.[1] The expulsion was justified on the following grounds, none of which justified such action: First, the comment on the letter to Lord Weymouth,

> which, if a breach of privilege, was cognisable by the Lords, and not by the Commons, and, if a seditious libel, was punishable by law; secondly, the publication of the 'North Briton,' five years before, for which he was already under sentence, and had suffered expulsion from a former Parliament; thirdly his impious and obscene libels, for which he was already suffering punishment, by the judgment of a criminal court; and, fourthly, that he was under sentence of the court to suffer twenty-two months' imprisonment.[2]

We have seen that both Houses had attempted to check the abuse by their members of their privileges;[3] and the greater responsiveness to public opinion, which the Houses were showing at the end of the eighteenth century, though it did not entirely do away with the risk of hasty and ill-considered action to which all assemblies are prone, prevented them from perpetrating any such foolish injustices as that of which they were guilty in *Wilkes's Case*. These tendencies were helped by the legislation passed to remedy the injustices to which the extent of the privileges of the Houses, and lengthening of the time during which Parliament was in session, had given rise.

(ii) We have seen that, as early as 1603,[4] an Act had been passed which indemnified a gaoler who had released a member of Parliament, and permitted a creditor to sue out new writs of execution after the period of privilege had expired; and that in 1700[5] some of the injustices caused to creditors by the lengthening of the sessions of Parliament, and therefore of the time during which they were unable to prosecute their actions, were partially remedied. In 1703 it was provided that actions against revenue officers, or against persons employed in "any other office or place of public trust," for acts done in relation to their offices, were not to be stayed by reason of privilege; but that such persons, if privileged, were not to be liable to arrest by reason of the bringing of such actions.[6] In 1738,[7] the Act of 1700, which applied only to personal actions, was extended to all actions in any court. In 1763[8] the creditors of those members of Parliament, whose trades or professions brought them within the categories of persons subject to the law of bankruptcy,

[1] Erskine May, Constitutional History ii 9-10. [2] Ibid 10-11.
[3] Above 545 nn. 5 and 9. [4] 1 James I c. 13; vol. vi 97.
[5] 12, 13 William III c. 3; vol. vi 257. [6] 2, 3 Anne c. 18.
[7] 11 George II c. 24. [8] 4 George III c. 33.

were empowered to sue out a summons against their debtors. If within two months of the service of the summons the debt was not paid or secured, the debtor was to be accounted a bankrupt as from the time of the service of the summons, and a commission of bankruptcy could issue against him.[1] The debtor was, however, still privileged from arrest "except in cases made felony by the Acts relating to Bankrupts."[2] In 1770[3] it was provided that, though the persons of members of Parliament should still be privileged from arrest, no action in any court should be stayed by reason of privilege of Parliament. It should be noted that the proviso of this Act, which protected members from arrest, was not extended to their servants.[4]

This legislation was efficacious in preventing the injustices to individuals, which the extent of the privileges of Parliament and the length of its sessions, had caused. It showed that both Houses of Parliament were prepared to adjust their claims of privilege to the new position which they were taking in the state.[5] It is due to the same cause that, in the latter part of the century, both Houses in fact, though not in theory, modified their attitude to strangers who wished to listen to their debates, and to the reporters of their proceedings. In fact the willingness of both Houses thus to adjust their claims is illustrated by the attitude of the House of Commons to these two questions. Hatsell tells us that, in spite of the standing order of the House of Commons excluding strangers, it was difficult to exclude them, and that "the House has in many instances winked at the breach of it."[6] In fact, in the latter part of the eighteenth century, though both Houses were unwilling to give express assent to their presence,[7] there is evidence that strangers, both men and women, were frequently present, not only in the gallery, but on the floor of the House of Commons.[8] In the

[1] § 1.

[2] § 4; proceedings against bankrupts entitled to Parliamentary privilege were further facilitated by 45 George III c. 124, and 52 George III c. 144 provided, in substance, that bankruptcy should cause suspension of the bankrupt for twelve months, and, if he were not discharged within that time, his seat should be vacated.

[3] 10 George III c. 50. [4] § 2.

[5] Walpole, Memoirs of George III iv 147, admits that the Act of 1770 "passed easily through the Commons," but he insinuates that many members, who would otherwise have opposed it, trusted that "it would be rejected in the other House"; in the House of Lords Lord Mansfield was its great supporter, ibid 148.

[6] Hatsell, op. cit. ii 129, cited Porritt, The Unreformed House of Commons i 578.

[7] A motion by Mr. Temple Luttrell in 1777 to reverse the standing orders with a view to the admission of strangers was lost by 83 votes to 16, Parlt. Hist. xix 206-211; in 1779 there was a debate as to the admission of members of the House of Commons and other strangers into the House of Lords; the House was not prepared to alter its standing orders; Lord Weymouth said that he should vote against any alteration, "although he wished to wink at the admission of strangers," Parlt. Hist. xx 470.

[8] Porritt, op. cit. i 578-579, 580-583.

case of reporters, the House practically gave up its attempt to prohibit reports after its contest with certain printers, who were backed up by the City of London, at the instigation of Wilkes.[1] Mr. Porritt says :[2]

In 1775 Horace Walpole, after telling one of his correspondents that "the House of Commons sat till past nine o'clock last night," excused himself from going into details, because "the newspapers are now tolerable journals." By 1786 shorthand reporters were employed at Westminster ; and by 1803 the reporters had so well established the usage which gave them the exclusive occupation of the back bench in the strangers' gallery, that, although unrecognised by any formal order of the House, their right to this place was acknowledged by Speaker Abbot and the sergeant-at-arms, which for the reporters was equivalent to recognition by the House.[3]

But perhaps the best illustration of this attitude on the part of the House of Commons is the history of its privilege to determine contested elections.

We have seen that the House of Commons finally gained this privilege in 1604 as the result of the case of *Goodwin v. Fortescue*.[4] It was a privilege of great value and importance in the seventeenth century ; but, in the eighteenth century, the jurisdiction had come to be exercised generally by the House, and sometimes by committees of privileges and elections,[5] on purely party lines. It is true that an Act of 1729[6] had enacted that the last determination of the House of Commons, as to the right to vote for any county borough or other place, should be final ; and we shall see that this Act had much to do with stereotyping the many anomalies in the representative system.[7] But, in spite of the Act, the House persisted in regarding election disputes as trials of party strength. The time of the House was wasted, great expense was caused to the parties, and proceedings of a judicial nature were conducted in a thoroughly unjudicial manner.[8] The scandal of these proceedings had become so notorious that in 1770[9] Parliament passed Grenville's Act,

[1] Erskine May, Constitutional History ii 39-49 ; Porritt, op. cit. i 593-595.

[2] Ibid 595, citing Cunningham, Letters of Horace Walpole vi 182.

[3] But as late as 1859, when a member complained of an incorrect report of his speech, Speaker Denison said, "the House does not recognise reports of debates. Therefore a correct or an incorrect report is out of its cognisance," ibid i 596.

[4] Vol. vi 95-96 ; the House had also asserted, as early as 1580, the right to order that the Speaker's warrant shall issue to the clerk of the Crown to make out writs for the election of a member to fill a casual vacancy in the House, Commons Journals i 126, Feb. 14 1580 ; the House could not give its authority when it was not sitting, and in 1672 it denied that the Lord Chancellor had this power, House of Commons' Journals ix 248 ; for this reason the Speaker was given a statutory power to issue his warrant during a recess, see 10 George III c. 41 ; 15 George III c. 36 § 1 ; 24 George III St. 2 c. 26.

[5] Porritt, op. cit. i 539.

[6] 2 George II c. 24 § 4.

[7] Below 563.

[8] See the preamble to 10 George III c. 16.

[9] 10 George III c. 16.

under which the jurisdiction was turned over to a committee. An elaborate procedure for selecting the committee by ballot was set up by the Act.[1] When this committee, which was to consist of forty-nine members, had been selected, the petitioner and the sitting member each added one.[2] Then each of the parties alternately struck off a member from the forty-nine till the number was reduced to thirteen.[3] These thirteen and the two nominated members were sworn to try the petition, and to give a true judgment according to the evidence.[4] Rules were made to ensure the continuous sitting of the committee, and the presence of its members.[5] The Act was not perfect. Both parties canvassed their supporters to attend the ballots, that they might get a decisive majority on the committee of forty-nine ;[6] and it was the practice for each party to strike the ablest members of the opposing party off the list.[7] But, in spite of these defects, it was universally admitted that the Act had effected a great improvement in the trial of election petitions.[8] It was made perpetual in 1774 ;[9] and though it was frequently amended,[10] it was the basis of the law till the House finally abandoned this privilege in 1868, and handed over the trial of disputed elections to the courts.[11]

It is clear that the practice of regarding the trial of election disputes as a purely party question, gave a decisive advantage to the party which had the majority in the House. That party, by its decisions, could add to its own members, and diminish the numbers of its opponents. George III was not likely to be willing to give up so valuable a weapon in his fight to recover his prerogatives by means of Parliamentary influence. But, in spite of his opposition, the Grenville Act was passed ;[12] and, in spite of his opposition, it was made perpetual.[13] The fact that it was passed in spite of his opposition shows that by 1770 the House was becoming more responsive to public opinion.[14]

[1] §§ 5-12. [2] § 11. [3] § 13. [4] § 13.
[5] §§ 19-23. [6] Porritt, op. cit. i 541.
[7] Erskine May, Constitutional History i 367—the process was known as "knocking the brains out of the committee."
[8] Hatsell described it as "one of the noblest works for the honour of the House of Commons and the security of the constitution that was ever devised by any minister or statesman," cited Porritt, op. cit. i 540 ; and there are many other similar eulogies, see Parlt. Hist. xvii 1062-1074 ; Erskine May, op. cit. i 366 and n. 5.
[9] 14 George III c. 15.
[10] See 11 George III c. 42 ; 25 George III c. 84 ; 28 George III c. 52 ; 32 George III c. 1 ; 34 George III c. 83 ; 36 George III c. 59 ; 42 George III c. 84 ; 47 George III c. 1 ; 53 George III c. 71 ; 9 George IV c. 22 ; 2, 3 Victoria c. 38 ; 4, 5 Victoria c. 58 ; 11, 12 Victoria c. 98.
[11] 31, 32 Victoria c. 125. [12] Porritt, op. cit. i 540. [13] Ibid 542.
[14] Walpole, Memoirs of George III iv 151-152 notes that the scandal of their action in the case of the Middlesex election, and "their dread of losing their future elections from their unpopularity" induced the House of Commons to pass Grenville's Act and the Act for the restraint of privilege.

It shows also that the House was beginning to realize that the old system, under the Parliamentary conditions which the pursuance by George III of his policy to "be a King" had produced, was likely to result in bringing about the state of affairs, which the claim to exercise this privilege had been designed to prevent in James I's reign—the state of affairs in which "none shall be chosen but such as shall please the King and Council." [1]

The responsiveness to public opinion, which is illustrated by these developments of the law as to the privilege of Parliament, was, as we have seen, materially helped by the procedure of the House of Commons. That procedure protected the minority and made it possible for it to get a hearing.[2] The reasons why the minority needed this protection will appear when we have examined the large powers which the constitution of both Houses put into the hands of the executive government. With this matter, with the powers of the House of Commons and the House of Lords, and with their places in the eighteenth-century constitution, I shall deal in the two following sections.

The Constitution, Powers, and Constitutional Position of the House of Commons

(1) *Constitution.*

Under this head I shall deal with the qualifications and disqualifications of members; the franchise; and the conduct of elections. A large and elaborate body of law, some of it old and some of it new, had come into existence on all these topics. Into its details I do not propose to enter. All I shall do is to show how the working of its rules combined to produce a very homogeneous assembly, composed largely of landowners, but supplemented by representatives of trade, of the law, of the civil service, of the army, of the navy, of the universities, and by other representative men. We shall see that the fact that it was a homogeneous assembly, representing both the wealth and the intellect of the country, was, first, the decisive factor in making the Parliamentary government, which had been secured by the Revolution, a success; and, secondly, the reason why a series of conventional practices was able to grow up, which maintained the balance of power as between the House of Commons, the House of Lords, and the Crown, and enabled them to work together without undue friction in their common task of government.

[1] 2 S.T. 98, cited vol. vi 96.

[2] Above 536, 537-538.

The qualifications and disqualifications of members.

The disqualifications of those convicted of treason or felony,[1] of minors [2] and aliens,[3] and, after 1801, of the clergy ; [4] and the disqualifications of office-holders and those holding pensions from the Crown, imposed at different periods and for different reasons ; [5] are less important in determining the character of the House of Commons, than the disqualifications which resulted from the statutes which imposed tests of religious orthodoxy and loyalty, and the statute which exacted a property qualification. Of these two sets of disqualifications and their effects on the personnel of the House of Commons I must say a few words.

Elizabeth's Act of Supremacy required members, before they took their seats, to take the oath of supremacy before the Lord Steward or his deputies ; [6] and in 1610 they were also required to take the oath of allegiance and abjuration.[7] Till these oaths were taken the person elected had no status as a member of Parliament.[8] In 1678 the Test Act required a declaration against trans-substantiation.[9] The oath of allegiance was simplified in 1689,[10] but the other oaths were retained ; [11] and they effectually debarred Roman Catholics from membership of the House until the law was changed in 1829.[12] Quakers were debarred till 1833, because they could not take an oath,[13] and Jews were

[1] Coke, Fourth Instit. 47-48 ; Bl. Comm. i 175 ; Anson, Parliament (2nd ed.) 80-81 ; for the question whether the House of Commons may by its resolution create a new incapacity see above 540-544.

[2] Coke, Fourth Instit. 47 ; Bl. Comm. i 162 ; 7, 8 William III c. 25 § 7 ; vol. vi 245 ; in spite of the Act minors continued to sit and speak in the House, but they did not vote, Porritt, The Unreformed House of Commons i 227-230 ; Fox was the last minor to sit and speak, ibid 230 ; at the end of the eighteenth century a patron generally put in a locum tenens till his nominee came of age, ibid 231-234.

[3] Coke, Fourth Instit. 47 ; Bl. Comm. i 162 ; 12, 13 William III c. 2 ; vol. vi 245 ; Porritt, op. cit. i 235-236.

[4] Blackstone, following Coke, Fourth Instit. 47, says that they were excluded because they had seats in convocation, Comm. i 175 ; for this reason they were excluded in 1621, Notestein, Commons Debates 1621 v 442, vii 444. Christian, in his note on this passage in the Commentaries, points out that when, after the Restoration, the clergy ceased to tax themselves in convocation, and were in consequence allowed to vote for members of Parliament in respect of their glebes, they ought to have been eligible to become members ; this seems to have been the view taken by a committee of the House in 1801, which was appointed to enquire into precedents, in consequence of Horne Tooke's election in that year, Porritt, The Unreformed House of Commons i 126 ; the consequence of the report of this committee was the passage of an Act disabling clergy of the Churches of England, Ireland, and Scotland, 41 George III c. 63.

[5] Vol. vi 242 ; below 635. [6] 5 Elizabeth c. 1. [7] 7 James I c. 6.
[8] Porritt, op. cit. i 130. [9] 30 Charles II St. 2.
[10] 1 William and Mary St. 1 c. 8. [11] Porritt, op. cit. i 138.
[12] 10 George IV c. 7.

[13] In 1695 Quakers had been allowed to affirm in cases where other persons were required to take oaths, 7, 8 William III c. 34, vol. vi 200-201 ; the Act was made permanent in 1714, 1 George I St. 2 c. 6, and extended to the Moravians in 1749, 22 George II c. 30 ; but it was not till 1833 that the House so interpreted these Acts

debarred till 1858,[1] because the oath of abjuration was taken "on the true faith of a Christian."[2] After the Revolution other oaths were established in order to safeguard the succession to the throne as established by Parliament. In 1696 members of the House of Commons were required to pledge themselves to adhere to William III, to defend the succession to the throne established by Parliament, and, if the King came to a violent end, to revenge his death.[3] The recognition by Louis XIV of James II's son as King was the occasion for an Act of 1701, which provided that persons elected to the House of Commons must take an oath recognizing the title of William III and negativing the title of James II's son.[4] The form of the oath was modified from time to time to meet the changes in the family of the exiled Stuarts ;[5] and, on the death of Charles Edward in 1788, the oath was directed against any of the descendants of the pretended Prince of Wales.[6] This oath survived till 1866.[7]

It is obvious that these oaths disabled persons from becoming members of Parliament if they disagreed fundamentally with the doctrines of the Established Church, or if they were opposed to the Revolution settlement. They therefore helped to produce a House, all the members of which were in agreement upon certain fundamental points. Probably in the eighteenth century it would have been considerably more difficult to govern the country, if these laws had not secured a House, the members of which were agreed upon these questions. That was a lesson which had been learned by the unsuccessful attempts, during the period of the Commonwealth, to govern by means of representative assemblies, the members of which differed upon all the fundamental questions then in issue.[8] We shall now see that this effect of the legislation, which imposed tests of religious orthodoxy and loyalty, was emphasized by the legislation which imposed a property qualification, and by other rules of law which debarred men of no property from membership of the House.

A statute of 1444-1445[9] enacted that

> knights of the shires for the Parliament hereafter to be chosen shall be notable knights of the same counties for the which they shall be chosen,[10] or otherwise such notable esquires, gentlemen of birth of the

as to admit Quakers to sit in Parliament, Porritt, op. cit. i 137 ; Erskine May, op. cit. iii 177.

[1] 21 and 22 Victoria c. 48 ; 29, 30 Victoria c. 19 ; Porritt, op. cit. i 144.

[2] Vol. vi 245.

[3] 7, 8 William III c. 27.

[4] 13, 14 William III c. 6 ; 1 Anne St. 1 c. 22 ; 4, 5 Anne c. 8 § 19 ; 6 Anne c. 7 § 20 ; 1 George I St. 2 c. 13 § 16.

[5] Porritt, op. cit. i 148 ; 6 George III c. 53.

[6] Porritt, op. cit. i 148.

[7] 29, 30 Victoria c. 19.

[8] Vol. vi 158-161.

[9] 23 Henry VI c. 14.

[10] Coke argued, and Hakewill agreed with him, that the effect of this and earlier statutes of Henry V and VI's reigns was not to render the election of a

same counties as shall be able to be knights ; and no man shall be such knight which standeth in the degree of a yeoman and under.

There appears to be only one instance in which a person was disqualified under this Act from sitting as the representative of a county, because he was not a knight or of gentle birth.[1] But the idea which underlay this statute was revived in another form after the Revolution. At that time the mediæval rules as to the payment of wages to members were things of the past,[2] and persons were ready to spend money to get a seat in the House of Commons.[3] In these circumstances it is not surprising that the question of a property qualification for members should be mooted. Shaftsbury's treatise on elections (which was published in 1688) advocated the restriction of membership of the House to men of substance ; [4] and in 1696 an agitation for legislation on these lines was started.[5] Bills creating a property qualification were rejected by the House of Lords in 1696 and 1702-1703.[6] But in 1710 a bill which created a property qualification became law [7]—thus, as Blackstone says, " reducing to greater certainty " the qualification prescribed by the Act of 1444-1445.[8] The Act of 1710 provided that every knight of the shire must have a clear estate of freehold or copyhold to the value of £600 a year, and that every representative of a city or borough must have a similar estate to the value of £300 a year.[9] The only persons who were not required to have these qualifications were the eldest sons of peers and of men qualified to be knights of the shire,[10] and the members for the universities.[11] The Act was intended to preserve the ascendancy of the landed gentry in the House of Commons ; it was commended for that reason by both Swift [12] and Blackstone ; [13] and certain evasions of it were stopped by a statute of 1760.[14] It continued in force till 1838 ; [15]

non-resident void, but merely to deprive him of his right to sue for his wages, and he said that this was the rule generally received, see Notestein, Commons Debates 1621 ii 51, iv 36, v 445 ; the provision of this and of the earlier statutes requiring residence were repealed in 1774, 14 George III c. 58 ; Bl. Comm. i 175.

[1] The case of Henry Gymber in 1450, Porritt, op. cit. i 122.

[2] Vol. iv 94 n. 4.

[3] Vol. vi 246 and n. 4.

[4] Cited Porritt, op. cit. i 166.

[5] Ibid 167.

[6] Ibid 168-169.

[7] 9 Anne c. 5.

[8] Comm. i 176.

[9] § 1 ; the estate of a mortgagee was not to qualify unless the mortgagee had been in possession for seven years before the time of his election, § 4.

[10] § 2.

[11] § 3.

[12] In the Examiner no. 45 he said that the Act was " the greatest security that was ever contrived for preserving the constitution, which otherwise might in a little time be wholly at the mercy of the moneyed interest," cited Porritt, op. cit. i 170.

[13] He said that it " somewhat balances the ascendant which the boroughs have gained over the counties by obliging the trading interest to make choice of landed men," Comm. i 176.

[14] 33 George II c. 20.

[15] 1, 2 Victoria c. 48 ; that Act allowed a similar amount of personal property to qualify, subject to the same exceptions as in the Act of Anne ; the property qualification was abolished in 1858, 21, 22 Victoria c. 26.

and, though it continued to be evaded by means of qualifications granted by friends, and by means of qualifications arranged for a consideration by bankers and attornies,[1] it probably had, at least during the earlier part of its existence, the effect which its framers designed. It then had on its side a preponderance of public opinion.[2] But there seems to be no doubt that, in the latter part of the eighteenth and early nineteenth centuries, it was systematically evaded [3]—the industrial revolution was altering the relative importance of landed and other property.

But the fact that the Act was evaded does not mean that it had become possible for men who had no property to enter the House of Commons. We shall see that the working of the complex rules as to the franchise,[4] and the manner in which elections were conducted in the eighteenth century,[5] were even more efficient barriers than the Act of 1710 against men of no property. Obviously this restriction of the personnel of the House of Commons to the wealthier classes, co-operated with the restrictions imposed by the statutes which set up tests of religious orthodoxy and loyalty, to produce an assembly of a very homogeneous character, and, in some cases, to produce a continuity in the tenure of seats by certain families,[6] which helped to make the House of Commons a stable, a practical, and an efficient assembly.[7] We shall see that just as the effect of the Act of 1710 was seconded by the complex rules as to the franchise, and by the manner in which elections were conducted, so all these bodies of law and practice worked together to create a House, which was able to effect those working arrangements of a conventional kind between the House of Commons and the House of Lords, and between Parliament and the Crown, to which I have referred.[8]

The franchise.

(1) *The county franchise.*—The county franchise was, as compared with the borough franchises, simple and uniform. Henry VI's Act of 1430 gave the franchise to forty shilling freeholders,[9] that is to every man who "shall have freehold to the value of forty shillings by the year within the county; which (by subsequent statutes) is to be clear of all charges and deductions, except Parliamentary and parochial taxes." [10] The Act of 1430 required voters as well as members to be resident. But this qualification for the exercise of the franchise was disregarded, probably at least as early as the beginning of the

[1] Porritt, op. cit. i 173-176. [2] Ibid 179. [3] Ibid 174-175.
[4] Below 556-557. [5] Below 558. [6] Below 557.
[7] Below 564-569. [8] Above 525-526. [9] 8 Henry VI c. 7.
[10] Bl. Comm. i 172; 18 George II c. 18 § 6.

seventeenth century,[1] and was swept away by the Act of 1774 which abolished the residential qualification for members.[2] Other statutes provided that voters, both for the counties and the boroughs, must not be minors ;[3] and that a conviction for perjury or subornation of perjury was a disqualification.[4]

The Act of 1430 was the basis of the county franchise down to 1832. It was supplemented by Acts designed to prevent the manufacture of votes by fraudulent grants of freeholds for the purpose of an election, and to ensure that the voter was the *bona fide* owner of an existing freehold qualification.[5] With the former object it was provided that agreements contained in such grants to reconvey, or conditions rendering the estate defeasible, should be void ; and that those who prepared or executed such conveyances, or voted on such qualifications, should be liable to a penalty.[6] With the latter object an Act of 1712 made it necessary that the voter should have been in receipt of the rents and profits of the estate, which gave the qualification, for one year before the election,[7] that the estate should have been assessed to " public taxes, church rates, and parish duties,"[8] and that he should take an oath as to the existence of his qualification.[9] For the assessment to public taxes, church rates, and parish duties there was substituted in 1745 an assessment to land tax twelve months before the election.[10] The Act of 1745 was modified in 1780.[11] Six months were substituted for twelve,[12] and provision was made for the publication of these assessments.[13] This qualification of assessment was not entirely satisfactory, since it afforded an opportunity for sharp practices. It was possible to attack the validity of the assessment ; and if the assessment was proved to be void, the right to vote disappeared.[14] Moreover, the requirement of proof of assessment to land tax as a condition of polling, not only created delay, but also made it difficult for the small holder to produce evidence of his qualification in

[1] Porritt, op. cit. i 24. [2] 14 George III c. 58 ; above 552 n. 10.
[3] 7, 8 William III c. 25 ; § 8 ; vol. vi 245 and n. 4.
[4] 2 George II c. 24, § 6.
[5] If the land was in trust or mortgage the c.q. trust or the mortgagor in possession was to have the franchise, 7, 8 William III c. 25, § 7.
[6] Ibid § 7 ; 10 Anne c. 23 § 1.
[7] Ibid § 2 ; there was a saving, continued in later Acts, for persons who had become entitled to the land " by descent, marriage, marriage settlement, devise, or presentation to some benefice in the church, or promotion to some office unto which such freehold is annexed."
[8] Ibid. [9] § 4. [10] 18 George II c. 18 § 3.
[11] 20 George III c. 17. [12] § 1. [13] § 3.
[14] Bl. Comm. i 173, Christian, note 32 ; Porritt, op. cit. i 26, says that it is recorded that in 1768 Sir James Lowther " nobbled the sheriff who rejected a large number of votes on the ground that the land tax lists, which were the registers of voters, were in many cases signed by only two commissioners and not by three, as the law required."

cases in which he had bought a small estate free of land tax, and was therefore not separately assessed to it.[1] An Act of 1788, which was designed to obviate some of these difficulties, by establishing a register of freeholders, met with so much opposition that it was repealed in the following year.[2]

In some respects this was a liberal franchise; and the wide meaning given to the word "freehold" made it even more liberal. The term "freehold" included, besides land, the numerous mediæval incorporeal hereditaments which, because they had been protected by the real actions, were classed as freeholds.[3] Besides annuities and rent charges issuing out of a freehold estate,[4] offices held for life in the church, in departments of the state, and in the courts of law, were freeholds which gave the franchise.[5] In 1693 "a chorister of Ely Cathedral voted at an election for the county of Cambridge in respect of his office; and in 1803 the brewer and butler of Westminster Abbey, the bell ringer, the gardener, the cook, and the organ blower all voted in respect of their offices."[6] In other respects it was not liberal. It excluded all but landowners, or those who owned property in some way issuing out of or connected with land; and it did not include all landowners—copyholders[7] and tenants for terms of years[8] were excluded. But it must be remembered that in all the counties, except Middlesex "which was dominated by its London boroughs,"[9] the landowners were the predominant element in the counties; and that, in theory, the franchise was given to a large number of landowners, and the owners of property connected with the land, some of whom were very humble persons. In practice, however, the number of persons who could freely exercise the franchise was much more restricted. Since the voting was open "people in dependent positions could seldom exercise a free choice."[10] The larger

[1] Porritt, op. cit. i 26.

[2] 28 George III c. 36; 29 George III c. 18; Porritt, op. cit. i 26-30.

[3] Vol. ii 355-357; vol. vii 317.

[4] In 1762 these were required to be registered with the clerk of the peace for the county in which the lands were situate twelve months before the election, 3 George III c. 24 § 1.

[5] Porritt, op. cit. i 22-23.

[6] Ibid 23; a Grenville committee disallowed the votes in respect of these Abbey offices; but, as Porritt says, the fact that they were allowed to poll is proof of the wide interpretation put on the word "freehold."

[7] 31 George II c. 14.

[8] Because their interest was a chattel interest and not a freehold.

[9] Namier, Structure of Politics i 83; in Surrey the metropolitan vote was in 1774 about twenty per cent, and in Gloucester and Yorkshire and other places there were important trading interests, but not important enough to affect seriously the predominance of the landed interest, ibid 84.

[10] Namier, op. cit. i 83; in 1621 complaints of undue influence in the elections for Yorkshire were made both against Sir Thomas Wentworth and Sir John Savile—obviously the elections were controlled by these two families, Notestein, Commons Debates 1621 iv 23, 49, 187.

landowners really elected the county members; and, since the peers were amongst the largest of these landowners, it is not surprising to find that they had much influence over the county elections, and that, consequently, the county members always included a certain number of the sons and relatives of peers,[1] as well as a larger number of country gentlemen with considerable estates.[2] Of the extent of this influence exercised by individual peers, which had considerable effects on the relationship between the House of Commons and the House of Lords,[3] Mr. Turberville has given us an illuminating summary. He says:[4]

> Sussex in the earlier part of the century was the virtual preserve of the Duke of Newcastle; Westmorland, at the end of it, was the complete preserve of the Earl of Lonsdale. But in nearly every case there were several different noble influences in the shire. The counties most completely under aristocratic control were Northamptonshire, Staffordshire, and Nottinghamshire. Notts, with its Dukeries, its Welbeck, Clumber, and Worksop, was inevitably dominated by the interests of Portland, Newcastle, and Norfolk. Cambridgeshire was under the control of the Dukes of Rutland and the Earls of Hardwicke; Gloucestershire of the Dukes of Beaufort and the Earls of Berkeley; Huntingdonshire of the Dukes of Manchester and the Earls of Sandwich. . . . So pervasive was the peers' influence in the counties that a pamphleteer maintained that in the Parliament of 1780 half of the members at least "are the near relatives or connexions of peers, without property or pretence except such relationship or connexion to be chosen by a county; almost another fourth are elected by some two or three peers; and I believe that it will be allowed to me that if the peers in every county were to unite they could nominate every county member except one." The generally alleged superiority of county to borough representation in the eighteenth century lay in the smaller amount of undisguised corruption in the counties, and the wider diffusion of influence—not in the absence of influence.

In these circumstances it often happened that a seat in the House of Commons became as hereditary as an estate or as a seat in the House of Lords.[5] In fact the elections for the counties were often arranged by the larger landowners without need for

[1] At the general election of 1761 twenty-three eldest sons of peers were returned to the House of Commons, Namier, op. cit. i 5.

[2] Ibid 7-9.

[3] Below 628.

[4] House of Lords in the XVIIIth Century 460-461; cp. G. S. Veitch, The Genesis of Parliamentary Reform chap. i; Laprade, Parliamentary Papers of John Robinson (R.H.S.) x.

[5] "Of no less than 30 among the 80 knights of the shires returned in 1761, the fathers had previously represented the same counties, while another 19 had been preceded by more distant ancestors in the direct male line; together 49 out of 80 can be said to have inherited their seats. Of another 20, ancestors in the direct male line had sat in Parliament, though for different constituencies, and only 11 were without Parliamentary ancestry in the male line," Namier, Structure of Politics i 93.

a poll. The expenses of a contested election were enormous ; [1] and generally, it was only if two rival houses in the county were determined to fight,[2] or if the political questions at issue were of first-rate importance, that a real fight occurred. Contests were avoided by compromises, sometimes between the peers and the country gentlemen, and sometimes between the rival political parties in the county. Thus, in 1774, " The Duke of Northumberland declared that if the gentlemen of the county ' would do him the honour to support his son, he would coincide with the sense of the county in the choice of the other member ' " ; [3] and " by the middle of the century a tacit understanding seems to have grown up between the Whigs who controlled at least four or five of the Shropshire boroughs, and the Tories, who predominated in the county." [4] It required some energy to whip up enthusiasm for or against measures of public importance.[5]

Thus the county franchise put the predominant power into the hands of the larger landowners—whether peers or commoners —to such an extent that it would be almost true to say that the legislation which imposed a property qualification for members was almost superfluous. Nor was this predominance resented. This was due to two causes. In the first place, as Bagehot has said,[6]

> our county society has always been an aristocratic society ; and in the eighteenth century aristocracy was a power of which it is difficult in these days of free manners and careless speech to realize the force. Society had then, far more than now, a simple, regular, recognized structure ; each class had its place ; it looked up to the classes above it ; it would have thought it wrong to vie with them, even to imitate them. Each class was to a certain extent independent ; each went its own way on its own affairs, attended to the transactions of its own calling, and the details of its own life : but each had a tendency, such as we can now hardly imagine, to be guided, impelled, and governed by those who were above them on all questions, and in all matters which concerned or seemed to concern all classes equally.

[1] " In 1768 the Duke of Portland is said to have spent £40,000 in contesting Westmoreland and Cumberland with Sir James Lowther. . . . In 1779 Mr. Chester spent between £20,000 and £30,000 in a great contest for Gloucestershire. . . . And within the memory of some men still living [this was written in 1861] an election for the county of York has been known to cost upwards of £150,000," Erskine May, Constitutional History i 354-355.

[2] Ibid 354. [3] Namier, Structure of Politics i 92.

[4] Ibid ii 298 ; for other illustrations of the purely personal character which politics often assumed see ibid 390-392.

[5] A Yorkshire politician wrote in 1782, " our zeal exhausts itself in the County cause and leaves us cold to more public questions," Wyvil, Political Papers iv 242, cited Laprade, Parliamentary Papers of John Robinson (R.H.S.) xi ; Walpole said in 1764, Memoirs of George III ii 16, " I endeavoured to spirit up addresses against the peace makers ; but languor prevailed, and none of our great Lords could be brought to send directions to their agents for tranfusing indignation through their counties."

[6] Essays on Parliamentary Reform 119.

In the second place, this deferential attitude on the part of the humbler classes was due to the fact that the landed gentry, both peers and commoners, did their best to deserve the trust which was reposed in them. They put hard and honest work into their management of the local government and of their own estates; and that management had the quality which our modern systems, which act with machine-like precision, lack—the personal touch. Unlike the French nobility, the English landowners loved the country, and were never so happy as when they were living amongst their people. As Arthur Young said,[1] "banishment alone will force the French to execute what the English do from pleasure—reside upon or adorn their estates." The source of the power of the English landowners was, as a rule, the influence which comes from character and from benefits received, and not from the use of a power to intimidate or oppress,[2] so that "there was a real comradeship of the soil between the noble and the humbler dwellers upon it."[3] The landowners had their reward. In the eighteenth century the influence thus exercised by them was one of the chief causes which made the House of Commons an efficient and a respected assembly;[4] and, long after the eighteenth-century conditions had ceased to exist, in the nineteenth and even in the twentieth centuries, the descendants of the families, which represented some of the constituencies of the eighteenth century, continued to represent the constituencies which took their place.[5] This long-continued respect and confidence, which changed conditions have not been able to change, makes it obvious that the influence, which was conceded to the landowners of the eighteenth century, rested upon a more solid and a more rational ground than many of the nineteenth-century critics of the unreformed House of Commons supposed.

We shall now see that the borough franchises, though they added other elements to the House of Commons, were so worked that they considerably increased the influence of the landowners.

(2) *The borough franchises.*—We must consider (*a*) the variety of the borough franchises, and the number and distribution of the boroughs; and (*b*) the effects produced by these phenomena upon the character of the House of Commons.

(*a*) It is impossible to do more than give a very brief description of the main classes of the almost infinite varieties of

[1] Travels in France (ed. 1792) i 45, cited Turberville, The House of Lords in the XVIIIth century 449.

[2] Mr. Turberville, op. cit. 450, has said of the exercise of the power of the landowners that "it worked as a rule—by means of favour, not of intimidation or oppression. Sometimes it was patriarchal, fatherly, benign. Landlord and tenant had a common pride—in England, in their own particular country side."

[3] Ibid. [4] Below 564-568.

[5] See the genealogical tables printed by Namier, The Structure of Politics ii 303-304.

the borough franchises; and a brief description is all that is necessary, since the subject has been dealt with in many books on constitutional history, and has been very adequately treated by Mr. Porritt. Mr. Porritt divides these franchises into four main classes: [1]

(i) The scot and lot and pot-walloper boroughs.[2] In these boroughs the vote depended, sometimes on the payment of the poor or church rate, and sometimes on the fact that the voter was a pot-walloper, that is that "he provided his own sustenance, that he was the master of a fireplace at which to cook it, and that he was in control of a doorway leading to his dwelling." In many of these boroughs the area of the Parliamentary borough was smaller than that of the town—it was to the interest both of the voter, and of those who wished to get the control of the borough, that the area should be restricted, because the vote was more valuable, and because it was easier to get control of the properties to which the right to exercise the vote was attached.[3] The number of voters in these boroughs was very various. At one end of the scale was Gatton with only six houses, at the other, large towns such as Westminster, Northampton, and Preston.[4] The trouble caused by the influx of strangers into these boroughs before an election, simply in order that they might vote, caused Parliament in 1786 to provide that voters must have resided six months before the election.[5]

(ii) The burgage boroughs.[6] In these boroughs the right of voting was attached to the ownership of certain tenements. In some places the holder must reside on the tenement: in other places there was no obligation of residence. In the latter case it sometimes happened, as at Old Sarum, that "ploughed fields gave the vote." [7] To the end, disputes as to the identity of, and title to, the tenements which gave the vote were a constant source of trouble to the House of Commons and its committees. The smaller boroughs, in which no residential qualification existed, were the easiest and the cheapest of all boroughs to control, and therefore of most value to their patrons. The large burgage boroughs, where there was a residential qualification, were some of the most expensive to control. The burgage tenements were very expensive to buy; and there was always the risk of a dispute as to whether or not any given tenement was a burgage holding.[8]

(iii) Corporation boroughs.[9] In the latter part of the fifteenth and in the sixteenth centuries, when seats in the House of

[1] The Unreformed House of Commons i chap. iii.
[2] Ibid i 30-33.
[3] Instances are Taunton, Bridgwater, Southwark, and Guildford.
[4] Porritt, op. cit. i 30-31.
[5] 26 George III c. 100.
[6] Porritt, op. cit. i 33-41.
[7] Ibid 35.
[8] Ibid 41.
[9] Ibid 41-57.

Commons were beginning to be valuable, there was a tendency to restrict the franchise to the members of the corporation. When, in the seventeenth century, the inhabitants began to protest, the corporation justified this restriction of the franchise by the plea that it avoided popular tumults; and, if the corporation could show a charter or prove a prescriptive usage, it had a secure title.[1] In the latter half of the seventeenth century many election disputes were caused by the desire of the inhabitants of these boroughs to share in the franchise; and though in some places a wider franchise was gained, in more places the corporation succeeded in establishing its claim.[2] In these corporations in which membership of the corporation gave the vote, there was sometimes a residential qualification, and sometimes not.

It was these corporation boroughs which fell most easily under the control of the landowners and other wealthy men, who either themselves became members of the corporation, or introduced their nominees.[3] We have seen that this system had most pernicious effects upon municipal government.[4] Because the members of the corporation regarded as their most important function the election to Parliament of those persons whom their patron had nominated, and because they regarded this right, together with the possessions of the corporation, as their exclusive property, they neglected their municipal duties, they diverted the corporation property to their own use, and they made it necessary for Parliament to create *ad hoc* bodies to perform the functions which they ought to have performed. Moreover, this species of franchise introduced another element of exclusiveness, which was not present in the other borough franchises. The Test and Corporation Acts did not incapacitate Protestant dissenters from being members of the House of Commons or from being electors to the House of Commons; "but they did apply to municipal corporations, and from nearly all of them dissenters were rigorously excluded." [5]

(iv) Freemen boroughs.[6] The freemen were originally the persons who were "free of," that is members of, the trade guilds. Mr. Porritt thinks that "in the first two or three decades of the seventeenth century the freemen voters may be taken to have adequately represented the constituencies in which they exercised the Parliamentary franchise." [7] But the growing value of a seat in Parliament exercised a very disturbing influence. In some boroughs the corporation kept down, often

[1] Porritt, op. cit. i 44-45, 46-47.
[2] Ibid 48-51.
[3] Ibid 54.
[4] Above 214-215, 228.
[5] Porritt, op. cit. i 55.
[6] Ibid 58-84.
[7] Ibid 60.

by very questionable practices, the number of freemen, in order to increase the value of a vote, and to ensure their own control.[1] In others a practice grew up of creating numbers of honorary and non-resident freemen;[2] and in boroughs in which there was no residential qualification, there was a class of freemen who were not honorary, that is they had acquired their freedom regularly by birth or apprenticeship or purchase, but had ceased to reside in the town.[3] In many towns honorary freemen were made in great numbers simply to vote at a pending election, until this practice was stopped by an Act of 1763, which deprived honorary freemen of their right to vote, unless they had been admitted twelve months before the first day of the election.[4] But this Act did not wholly end this abuse, since it was still possible to create, on the eve of an election, freemen who were not honorary—at Malden in 1826 one thousand freemen were admitted during an election.[5] The result was that some of these freemen boroughs were remarkable for the small, and others for the large, number of their voters. "On the eve of the Reform Act of 1832 the electors in the freemen boroughs varied in number from six at Rye and fourteen at Dunwich to six thousand at Bristol and twelve thousand in the City of London."[6] As Maitland has shown,[7] Oxford and Cambridge were typical of these two classes of freemen boroughs.

The constitutions of Oxford and Cambridge were closely similar on paper. They went to the bad in different ways. The freemen of Oxford were numerous; the freemen of Cambridge few. Too many of the Oxford corporators lived in the workhouse; too many of the Cambridge corporators lived near Cheveley. It is of beer and mob rule that we read in the one town; in the other of oligarchy and wine: excellent wine, said an unregenerate alderman, and plenty of it.

Both sorts of boroughs fell under the influence of patrons—of peers and landowners or men who had made their fortunes in trade. But, whilst the boroughs of the Cambridge type were comparatively cheap to control, a contested election in boroughs of the Oxford type cost almost as much as a contested county election. In boroughs of the former type "much could be done with the aid of government offices; and a thousand or two thousand pounds accomplished much in boroughs in which there were fewer than twenty freemen."[8] In boroughs of the latter type it was far otherwise.

[1] Porritt, op. cit. i 72-73. [2] Ibid 60, 62-63. [3] Ibid 63.
[4] 3 George III c. 15; Bl. Comm. i 175, and Christian's note.
[5] Porritt, op. cit. i 66; an Act was passed to stop this practice at Coventry in 1781, 21 George III c. 54—but it only applied to Coventry.
[6] Porritt, op. cit. i 71. [7] Township and Borough 94-95.
[8] Porritt, op. cit. i 76.

In 1790 Lord Penrhyn spent nearly thirty thousand pounds in unsuccessfully contesting Liverpool, at an election when nineteen hundred and sixty-seven freemen voted; and at an election there forty years later, when the freemen had become much more numerous, eighty thousand pounds were expended, and two thousand and sixty freemen were bribed.[1]

Throughout the eighteenth century Parliament did little to remedy these anomalies. Besides the legislation as to residence which I have already mentioned,[2] it did little more than extend to freeholders in those towns which were counties, the legislation applicable to the freeholders in the counties.[3] So far from remedying these anomalies it stereotyped them, by enacting in 1729 that the last determination of the House on an election petition should be final.[4] This Act gave a secure title to many borough owners, and is said to have enhanced the value of other boroughs almost as much as the Septennial Act.[5] It was not till 1788 that it became possible to question a right of election determined by the House, and then only if the determination had been made after 1729.[6]

In 1832 the number and distribution of the boroughs were almost as anomalous as some of their franchises.

In the eighteenth century there were 513 English and Welsh members in the House of Commons. Of these, 94 represented the English and Welsh counties, 4 represented the universities of Oxford and Cambridge, and 415 represented the English and Welsh boroughs.[7] The representatives from the boroughs, therefore, largely out-numbered the representatives from the counties and the universities.

The distribution of the English boroughs is partly accounted for by the distribution of the population and the wealth of England in the sixteenth century. The largest number of boroughs which returned members to Parliament were in the east, the south, and the south-west of England; and of these boroughs almost one-third were in the maritime counties. The twelve counties of Norfolk, Suffolk, Essex, Kent, Sussex, Hants,

[1] Porritt, op. cit. i 76-77.

[2] Above 552 n. 10, 555.

[3] 13 George II c. 20; 3 George III c. 24; above 554-556.

[4] 2 George II c. 24 § 4; Porritt, op. cit. i 10; 7, 8 William III c. 7, had declared that any return made contrary to the last determination of the right of election by the House of Commons was illegal, but this statute was held to bind only returning officers, and not the House, ibid i 9; the Act of 1729 bound the House, ibid.

[5] Ibid 10.

[6] 28 George III c. 52 §§ 26, 27 and 31; Porritt, op. cit. i 11; Bl. Comm. i 175, and Christian's note; the Act (§ 31) repealed 2 George II c. 24 § 4 so far as that Act related to determinations subsequent to 1788; as apparently it was doubtful whether 2 George II c. 24 § 4 related to determinations made subsequently to 1729, §§ 26 and 27 created a new procedure, which allowed a determination of the House to be questioned if made after that date.

[7] Porritt, op. cit. i 17.

Dorset, Devon, Cornwall, Somerset, Gloucester, and Wilts returned one hundred and seventeen members; and of these fifty-six were on the sea coast.[1] "When England was still sparsely populated, it was in keeping with social and economic development that population should be densest and towns most numerous along the south-eastern and southern sea-board, and on the navigable rivers which gave access to the sea." [2] But economic causes do not wholly account for this distribution of the Parliamentary boroughs. When a seat in Parliament became valuable, boroughs which had once been summoned to Parliament, but had ceased to do so, petitioned successfully for a renewal of their summons; [3] and we have seen that Edward VI and Elizabeth gave the right of representation to boroughs because they were small and easily influenced.[4] Many Cornish boroughs were given the right of representation in Parliament because the influence of the Crown, through the Duchy, was paramount. From the latter part of the sixteenth century onwards, it was obvious that they were wholly under the control of the Crown or some of the large landowners; [5] and in 1687 Locke described some of the absurdities which resulted, in terms which were quite as strong as any that a reformer of 1832 could have used.[6] But because they had come under this control, they were useful to the Crown and to both the political parties; and so, in spite of the fact that the distribution of seats was anomalous in 1689, no changes were made at the Revolution, and in spite of the vast social and economic changes which had taken place between 1700 and 1832, very few changes were made in the distribution of seats between those dates.

(*b*) What was the effect of the existing borough franchises, and of the number and distribution of the borough seats, upon the character of the House of Commons?

The anomalies of the borough franchises, and the bad effects which they had upon the system of municipal government, are obvious.[7] The number and distribution of the borough seats could not be justified in 1689—still less in 1832. And yet, as Bagehot said in 1860, in spite of all its defects, [8]

this unreformed system of representative government is that which lasted the longest; which was contemporary with the greatest events;

[1] Porritt, op. cit. i 90. [2] Ibid 91.

[3] Hallam, C. H. iii 39—the number thus restored down to 1641 was fifteen; none were thus restored after the Restoration.

[4] Vol. iv 96 and n. 3. [5] Below 576.

[6] Two Treatises on Government, Bk. II § 157, cited vol. vi 210 n. 4; Blackstone says, Comm. i 174, "The misfortune is that the deserted boroughs continued to be summoned, as well as those to whom their trade and inhabitants were transferred."

[7] Above 559-563; below 577.

[8] Essays on Parliamentary Reform 109.

which has developed the greatest orators, and which has trained the most remarkable statesmen.

In fact it attained the two greatest ends which a system of representative government can attain—it sent to Parliament the ablest men in all the most important spheres of the nation's activities, and it gave adequate expression to the educated public opinion of the day. A system which produced a House of Commons of which this can be said cannot be wholly condemned, merely upon the ground that it contains many illogical, irrational, and anomalous features. We who have experience of the defects of a House of Commons elected upon a system which is certainly more logical and less anomalous, and, in the opinion of many, more rational, can take a more impartial view of the strong and weak points of the old system than our forefathers, who could not be wholly impartial judges of the wisdom of the measures by which they swept it away, and substituted a very different system. In fact, if we look, not at the patent anomalies and absurdities of the unreformed system, but at the manner in which it was used to produce a House of Commons which was at once able and representative, we can see that the political genius of the race succeeded in constructing a system which has given results which are in many respects better than the numerous short-lived and far more logical systems which have succeeded it.

The reasons why this unreformed system gave England a House of Commons which was intellectually the equal of any which has succeeded to it, and far superior to any which a completely democratic franchise can produce, can be summarized as follows:

First, the varieties of the franchise in different places ensured that it represented all sorts of opinion, the opinion of the lowest as well as of the highest classes, and yet that it gave a greater influence to the intellectual few than to the ignorant many. This advantage of the unreformed system was pointed out in 1793, in the debate on Grey's motion for the reform of Parliament;[1] and it was emphasized by such sound Whigs as Mackintosh and Lord John Russell.[2] It is the greatest of the

[1] Jenkinson said: "The hon. gentleman and the petition on this table rather proposed uniformity of election. His ideas were the reverse—that the modes of election ought to be as varied as possible, because, if there was but one mode of election, there would, generally speaking, be but one description of persons in that House. His opinion was, that there ought to be a variety of descriptions of persons in that House; and by a very varied mode of election only could that variety be secured," Parlt. Hist. xxx 816; cp. Paley, Principles of Moral and Political Philosophy (2nd ed.) 472, who said that, "by annexing the right of voting for members of the House of Commons to different qualifications in different places, each order and profession of men in the community, become virtually represented."

[2] Bagehot, Essays on Parliamentary Reform 62-65; and see Ed. Rev. (1818) xxxi 165-203 for an argument against universal suffrage, and in favour of maintaining a variety of rights of franchise.

blots upon the system introduced in 1832 that it substituted uniformity for variety, and threw away the greatest of the safeguards against the gradual introduction of a democratic representation which, in effect, disfranchises the most enlightened classes, and thus introduces a vulgarity of tone into the discussions of public business, which tends to lower the political ability of the nation.[1] It may be said that the unreformed system gave the greatest influence, not to intellect, but to wealth, and especially to wealth in land. No doubt wealth is an imperfect test of intelligence; but as Bagehot has said,[2] "it is some test. If it has been inherited it guarantees education; if acquired it guarantees ability." Moreover, it guarantees not merely an academic intelligence, which may easily originate wild theories and unpractical legislative proposals calculated to mislead an ignorant electorate, but political intelligence. "Property is not only an indication of general mind, but has a peculiar tendency to generate *political mind*." [3] No doubt the greatest weight was given to property in land. But it must be remembered, first, that land was still the most important form of property; secondly, that many of the larger boroughs—boroughs with over 1,000 voters—voluntarily chose their representatives from the landed gentry;[4] and thirdly, that, long after the representative system had been reformed, this preference for the landed gentry continued.[5] And there is no doubt that, under the old system, the representatives of many other important interests could get into Parliament. The commercial men, the army, the navy, the civil service, the law, and colonial interests were all represented.[6]

Secondly, though the system of rotten or nomination boroughs helped to put more power into the hands of the peers and the landed gentry, it also helped, paradoxical though it may appear, to make the unreformed House of Commons (i) more representative of important interests in the nation, (ii) more representative of the intellect of the nation, and (iii) to a certain extent more adaptable to the changing conditions of the nation.

[1] "No defect really eats away so soon the political ability of a nation," Bagehot, op. cit. 34. [2] Ibid 40. [3] Ibid.

[4] Namier, Structure of Politics i 105, says, "should anyone expect to find in the 46 representatives of the big trading and manufacturing towns typical members of the middle classes he will be disappointed. In 1761 eight were sons of peers, and, on the severest scrutiny, excluding amphibious types, a further 24 were country gentlemen"; for illustrations see ibid i 107-108; as Bagehot says, Literary Studies i 240, "even in the boroughs, where there was universal suffrage, or something near it, they [the landowners] were the favourites."

[5] Bagehot writing in 1866, said that in the House of Commons "the landed gentry far surpassed any other class," and that "men who study the structure of Parliament not in abstract books, but in the concrete London world, wonder, not that the landed interest is very powerful, but that it is not despotic," English Constitution 163-164.

[6] For details as to the representation of these interests see Namier, Structure of Politics, i 31-72; Age of the American Revolution 263-316.

(i) Mr. Namier has truly said that the class of member which the counties returned

might possibly have sufficed for a self-centered nation never for an Empire. . . . The most respectable constituencies in Great Britain returned the dullest members; they did not supply the architects and craftsmen of government and administration. The boroughs under Government management, or acquired by the Government at the time of election, opened the gates of the House to budding statesmen and to hard working civil servants . . . to various law officers of the Crown, to admirals and proconsuls; in short to men who had the widest and most varied experience of administrative work; while the promising young men and the "men of business" of the Opposition were similarly provided for by its borough patrons.[1]

(ii) It is often claimed for the rotten boroughs that they were a nursery of statesmen, and the means by which men of ability, who would otherwise have had no chance of entering the House of Commons, were brought into it. No doubt, as Bagehot [2] and Mr. Porritt [3] have shown, this is an exaggerated claim. In very many cases these members were mere nominees of their patrons who must vote as their patrons directed; [4] and in some cases the patron used his powers capriciously and unreasonably.[5] But in some cases they were left free to vote as they pleased, and in some cases patrons did introduce men into Parliament, who either would not have entered Parliament at all, or who could only have been introduced into Parliament with considerable difficulty and at considerable expense.[6] Probably, as Mr. Namier has pointed out,[7] the main usefulness of these boroughs, is to be found in the fact that they helped to supply an electoral organization both for the government and the opposition, which was more successful than our modern electoral organization in supplying seats to men of ability.[8] They were, as Bagehot has said, "higher class constituencies; they gave a representation to persons of greater wealth, of greater education, and presumably therefore of greater political capacity than the mass of the nation." [9]

[1] Age of the American Revolution 5.
[2] Essays on Parliamentary Reform 172-180.
[3] The Unreformed House of Commons i 362-363.
[4] Ibid 359-360.
[5] See Gibbon's letter of Sept. 8 1780 to Eliot on his refusing to have him re-elected for Liskeard, Letters i 388-390; as he put it in his autobiography, Autobiographies of Gibbon Memoir E, 33, "Mr. Eliot was now deeply engaged in the measures of opposition, and the electors of Liskeard are commonly of the same opinion as Mr. Eliot."
[6] "Young men of promise were then occasionally brought into Parliament by the patrons of such constituencies, and great statesmen sometimes found a refuge in them during moments of unpopularity," Bagehot, Essays on Parliamentary Reform 103.
[7] Age of the American Revolution 5-6.
[8] Below 582.
[9] Essays on Parliamentary Reform 124.

(iii) The rotten boroughs, to a certain extent, helped the old system of representation to adapt itself to the changed conditions of the nation. The common complaint in the middle of the century, that the "nabobs" had forced up the price of seats, shows that it was through these boroughs that increased representation was given to the commercial men. The fact that the number of commercial men in the House of Commons had increased was noticed by Lord Mansfield,[1] and used by him as an argument for the Act of 1770, which abolished the privilege which prevented members of public from prosecuting their actions against members of Parliament during the session of Parliament.[2] It was through these commercial men, as Mr. Namier has pointed out,[3] that

> the *nouveaux-riches* in every generation were able to enter the House of Commons; and this occurred with such regularity that by tracing the history of these new men one could follow the rise and fall of various branches of commerce, the development of modern finance, and the advance of capitalistic organization in industry, and measure the relative importance of the West and East Indies.

On the whole, the manner in which members of the House of Commons were selected in the eighteenth century, though it was full of anomalies, produced a House of Commons which voiced the educated public opinion of the day. Gibbon, writing in 1792, said that the House formed "in *practice* a body of gentlemen who must always sympathize with the interests and opinions of the people." He added that "the slightest innovation launches you without rudder or compass on a dark and dangerous ocean of theoretical experiment."[4] But changed industrial and economic conditions were, when he was writing, creating the need for some innovation. It would, however, be true to say that, until these changes took place, this unreformed system "gave a ruling discretion to those whom the nation at large most trusted; it provided a simple machinery for ascertaining with accuracy the decisions at which the few had arrived, and in which the mass concurred."[5]

[1] "The case now is very different, both merchants and manufacturers are, with great propriety, elected members of the lower House. Commerce having thus got into the legislative body of the kingdom, privilege must be done away. We all know that the very soul and essence of trade are regular payments; and sad experience teaches us that there are men who will not make their regular payments without the compulsive power of the law. . . . Any exemption to . . . particular ranks of men is, in a free and commercial country, a solecism of the grossest nature," Parlt. Hist. xvi 976.

[2] Above 547. [3] Age of American Revolution 6.

[4] Letters ii 356; cp. Paley, Principles of Moral and Political Philosophy (2nd ed.) 489.

[5] Bagehot, Essays on Parliamentary Reform 126; Porritt, The Unreformed House of Commons i 273-282, has, I think, proved that Bagehot's verdict is correct; above 565-566.

We shall now see that these effects of the manner in which the House of Commons was selected were intensified by the manner in which the elections were conducted.

The conduct of elections.

The whole expense of the conduct of elections was thrown upon the candidates. These expenses consisted partly of sums of money paid to the returning officers and their employés, which were in some cases sanctioned by statute and in other cases merely customary and destitute of any legal sanction ; [1] and partly of money paid directly to the voters, or spent on entertaining them or on getting them to the polls, or on otherwise influencing their votes.[2] Attempts were made all through the eighteenth century, both by the Legislature and by the House of Commons, to put down direct bribery.[3] The illegality of bribery and other corrupt practices was universally recognized. Everyone in theory professed to believe that a member of Parliament ought to be chosen freely by his constituents. But most people admitted that many kinds of influence might legitimately be employed to get votes. The influence of men of property and ability was, not unreasonably, considered to be preferable to the duress which a mob of ignorant and needy persons might otherwise have brought to bear.[4] In 1779 there was a debate on a complaint against the duke of Chandos, that he had used his position as lord lieutenant to influence the Southampton election. Lord North admitted that a lord lieutenant ought not to use influence derived from his official position as head of the militia, " but that his situation as lord lieutenant was not to stand in the way of his making use of his family and landed interest "—that, he held, was " perfectly agreeable to the constitution " ; [5] and with this view Burke agreed.[6] But this point of view made it very difficult to

[1] Below 571-572. [2] Below 575-577. [3] Below 573-575.

[4] " The typical eighteenth-century view tends to regard aristocratic intervention rather as a safeguard than as a menace to the freedom of elections. The danger to be apprehended was that of intimidation by the mob. Thus an article in the *London Magazine* thanks God that the elections ' do not depend upon the giddy mob. They are generally governed by men of fortune and understanding,'" Turberville, House of Lords in XVIIIth Century 455 ; Laprade, Parliamentary Papers of John Robinson (R.H.S.) x, says that, " in the few constituencies in which opinion might have been voiced by the people *en masse* contested elections were dreaded as an evil and were seldom held if it was possible to avoid them."

[5] Parlt. Hist. xx 1271.

[6] " It is true that the peers have a great influence in the kingdom, and in every part of the public concerns. While they are men of property, it is impossible to prevent it, except by such means as must prevent all property from its natural operation : an event not easily to be compassed while property is in power ; nor by any means to be wished, while the least notion exists of the method by which the spirit of liberty acts, and of the means by which it is preserved," Thoughts on the Cause of the Present Discontents, Works (Bohn's ed.) i 322-323.

distinguish legitimate from illegitimate influence; and illegitimate influence easily shades off into direct bribery and other corrupt practices. In fact, in the eighteenth century, no attempt was seriously made to draw this difficult distinction, with the result that the statutes directed against bribery and corrupt practices had very little effect, and the occasional punishments inflicted by the House of Commons in unusually flagrant cases, were in the nature of isolated phenomena. Nor was it possible for eighteenth-century statesmen to make a serious attempt to draw this distinction; for it was by means of influence of many different kinds that the various parts of the composite eighteenth-century constitution were made to work harmoniously. The relations between the local and the central government,[1] the relations between the House of Commons and the House of Lords,[2] the relations between the Crown and Parliament [3]—all depended on influence. In these circumstances it was impossible to eliminate influence from the elections to the House of Commons; and so the control of the landowners and the wealthier classes, which the statutes as to the qualifications of members and the condition of the franchise had made inevitable,[4] was finally consolidated.

I shall deal with this topic under the following heads: the machinery of elections; attempts to suppress bribery and corrupt practices; and the widespread use of influence, and its effects upon the eighteenth-century constitution, and on the House of Commons.

The machinery of elections.

We do not hear much of any law as to the machinery for conducting elections before the latter part of the seventeenth century. In the Middle Ages "the machinery of elections was of the simplest character, and it was then to everybody's interest that elections should cost as little as possible; for all election expenses, like the wages and travelling allowances of knights and burgesses, were a common local charge." [5] It seems to have been equally simple down to the beginning of the seventeenth century—Coke has very little to say about the conduct of elections; [6] and even at the end of the century there seems

[1] Above 238-241; below 579.
[2] Below 628.
[3] Below 630.
[4] Above 553, 556-558, 562.
[5] Porritt, The Unreformed House of Commons i 182.
[6] Coke, Fourth Instit. 48-49, tells us that an election ought to take place between 8 and 11 a.m.; that if begun within that time, it may be prolonged after those hours if it cannot be sooner determined; that if a poll be demanded a scrutiny cannot be denied "for he cannot discern who be freeholders by the view"; that a charter of incorporation cannot introduce a restriction upon an existing franchise in a borough, though by original grant or custom a selected number of burgesses may be entitled to elect; it is clear that the law as to the conduct of elections is almost non-existent.

to have been very little law as to how the sheriff should conduct an election.[1] But in the latter part of the seventeenth century conventional rules were growing up. Sheriffs and candidates would agree on rules to be observed at a forthcoming election ;[2] candidates were appointing agents ;[3] and as early as 1701 "inspectors were established at county polls in the interest of candidates."[4]

In these circumstances it was inevitable that election expenses would be incurred ; and, having regard to the universal method of paying officials by fees,[5] it was inevitable that officials connected with elections would demand payment in this form. Hence we find that, without any sanction from statute, all sorts of fees began to be demanded from candidates ; and that the amount of these fees tended, as usual, to increase. All sorts of persons—clerks and messengers in the Crown office who despatched the writs, sheriffs and their clerks and servants, town clerks and their clerks and servants—all exacted customary fees for which there was no statutory authority.[6] Officials in the Crown Office were compensated when, in 1818, the despatch of writs was turned over to the Post Office.[7] But others were not so fortunate. In 1808 Lord Ellenborough, C.J., held that the high bailiff of Westminster could only charge such fees as were sanctioned by statute, or such expenses as the candidate had consented to incur ; and that fees and expenses which rested on custom only were irrecoverable.[8]

In the eighteenth century these customary fees were generally paid without demur by the candidates,[9] partly because the principle that candidates should bear their election expenses had been sanctioned by the Legislature, and partly because a refusal to pay would have antagonized officials whose favour was desirable.[10] In the late seventeenth and eighteenth centuries certain statutes had authorized or compelled the incurring of

[1] Porritt, op. cit. i 185, citing Dalton, Office of Sheriff (ed. 1682) 333.
[2] Ibid 186. [3] Ibid. [4] Ibid. [5] Above 512.
[6] Porritt, op. cit. i 184-185, 197-201 ; in 1705 the total expense of the members for Woodstock was £15 3s. 0d., and the bill contained no mention of fees to the town clerk or other official charges ; but in 1833 a customary sum of £57 11s. 4d. in respect of fees paid by the town clerk was demanded, and refused till the town clerk could produce statutory authority for the charge ; the town clerk could only say that it was a customary charge which no one had hitherto disputed, ibid 188, 201.
[7] Ibid 184.
[8] Morris v. Burdett (1808) 1 Camp. 218 ; cp. Porritt, op. cit. i 193-195 ; as the result of this case an Act was passed in 1811, 51 George III c. 126, which extended the Act of 1745, below 572, to Westminster.
[9] Above n. 6.
[10] In a debate in 1722 on a bill for securing freedom of elections, allusion is made to "abuses in the manner of despatching writs to the sheriffs," to the bribery of returning officers, and to promises to indemnify against penalties, Parlt. Hist. vii 949-950 ; cp. Porritt, op. cit. i 184.

expenses, and had, expressly or by implication, made the candidates liable to pay them. Thus in 1695-1696 [1] the sheriff of Southampton was authorized to adjourn the poll from Winchester to Newport, Isle of Wight. Nothing was said about the payment of the expense of this adjournment; but since it was to be made at the request of the candidates it was by implication thrown upon them.[2] In 1710 the Act which required a property qualification for members,[3] provided that a candidate could be compelled by his rival to take an oath as to his qualification, and that the officers who were conducting the election could charge certain fees in connection therewith.[4] In 1794 returning officers, at the request of candidates, were obliged to nominate persons to administer the various oaths which electors were required to take, and to appoint places where the oath should be taken; and it was provided that the candidates should bear the expense of providing these places and of paying the person who administered the oaths.[5] In 1711 the sheriffs of Yorkshire and Chester were allowed to charge the candidates the expense of providing seven convenient tables or places for the taking of the poll.[6] In 1745 sheriffs and under sheriffs were to provide, at the expense of the candidates, booths for taking the poll, and clerks for each booth, who were to be paid by the candidates one guinea a day.[7] When, in 1780, a duplicate of the land tax assessment was made the qualification for a vote,[8] candidates who requested the clerk of the peace to attend with these duplicates were required to pay him two guineas a day and his travelling expenses.[9] The Act of 1785, which allowed the poll to be kept open for fifteen days,[10] indirectly added to the statutory and other expenses of an election, because it was used by unscrupulous candidates as a means of protracting the poll for the maximum time.[11] It should be noticed that none of these statutes, which made candidates liable for election expenses, except the statute of 1794, applied to elections in boroughs, until an Act of 1828 applied the Act of 1745 to boroughs in which the electors numbered more than six hundred.[12]

[1] 7, 8 William III c. 25 § 10.
[2] Porritt, op. cit. i 185.
[3] Above 553.
[4] 9 Anne c. 5 §§ 5 and 8.
[5] 34 George III c. 73 §§ 1 and 6.
[6] 10 Anne c. 23 §§ 6 and 7.
[7] 18 George II c. 18 § 7.
[8] Above 555.
[9] 20 George III c. 17 § 14.
[10] 25 George III c. 84 § 1.
[11] "Then grew up the practice of keeping the poll open for fifteen days by contriving to bring voters forward within the statutory limit of one an hour. This manœuvring caused great expense and infinite vexation to a candidate who was in the lead and who, it was often known, had a safe majority. Men who were reckless in their expenditure thus had it in their power to penalize their opponents, and not infrequently did so in contests in boroughs as well as in counties, Porritt, op. cit. i 190-191.
[12] 9 George IV c. 59; as Porritt points out, op. cit. i 195, the limit of six hundred electors excluded nearly two-thirds of the boroughs.

These Acts show that a more elaborate law as to elections was growing up, and that increased elaboration entailed increased expense. But we shall see that the Acts which attempted to suppress bribery and corrupt practices, and the manifold kinds of influences brought to bear on electors, also show that the election expenses imposed on candidates by these Acts, were the smallest part of the total cost of an election. In 1780 Burke, in opposing a motion for shorter Parliaments, said : [1]

> The charge of elections ought never to be lost sight of in a question concerning their frequency ; because the grand object you seek is independence. Independence of mind will ever be more or less influenced by independence of fortune ; and if every three years, the exhausting sluices of entertainment, drinkings, open houses, to say nothing of bribery, are to be periodically drawn up and renewed ; if government favours, for which now, in some shape or other, the whole race of men are candidates, are to be called for on every occasion, I see that private fortunes will be washed away, and every, even to the least, trace of independence borne down by the torrent. I do not seriously think this constitution, even to the wrecks of it, could survive five triennial elections.

With these two causes for the increase of the expense of elections indicated by Burke—bribery and corrupt practices, and the use of many kinds of influence—I shall deal in the two following sections.

Bribery and corrupt practices.

In the eighteenth century two Acts were in force which were directed against bribery and corrupt practices—an Act of 1695-1696 and an Act of 1729.

The Act of 1695-1696 [2] enacted that, after the issue of the writs of election upon the summoning of Parliament, no person should, by himself or by an agent, do any of the following things : directly or indirectly give to electors money, meat, drink, entertainment, or provision ; or make any present, gift, reward, or entertainment ; or promise to give any of these things either to an elector, or to any county or borough, to the use either of the elector or of the county or borough.[3] Candidates guilty of these practices in any county or borough were disabled from serving in Parliament for that county or borough.[4] It will be observed that the Act did not apparently penalize bribery and corrupt practices indulged in before the issue of the writ summoning Parliament, or before the issue of a writ for an election.

The Act of 1729 [5] required electors, before admission to the poll, to take an oath that they had not received any money or other reward for their votes.[6] Returning officers were required

[1] Parlt. Hist. xxi 609. [2] 7, 8 William III c. 4. [3] § 1.
[4] § 2. [5] 2 George II c. 24 ; Stephen, H.C.L. iii 253. [6] § 1.

to take an oath that they had not received any money or other reward for making a return.[1] Persons who swore these oaths falsely were to be liable for the penalties for perjury, and, on conviction, were incapacitated from ever voting again.[2] Persons who asked, received, or took money or other reward, or who agreed to take money or other reward, for voting or forbearing to vote; or persons who by themselves or by their agents procured votes or forbearances to vote by gifts of money or other rewards; were liable to a penalty of £500, to incapacitation from ever voting again, and to the loss of any office they might hold in any city or borough.[3] The Act was to be read by the returning officer at every election of members of Parliament and of borough officers, and at the Easter quarter sessions.[4] As Stephen points out, it was defective in that it "left unpunished all payments for having voted and all corrupt practices except giving or promising 'money or other rewards,' and all gifts to other persons than voters."[5]

In the late seventeenth and eighteenth centuries the House of Commons was occasionally stirred to action when a peculiarly flagrant case of corruption was brought to its notice.[6] In 1768 the city of Oxford owed debts amounting to £5,670.[7] The approach of a general election seemed to offer a good opportunity of diminishing this debt; and, without the consent of the city council, an offer was made by certain persons to a person in London to return any two members who would pay £4,000.[8] The city council did not wholly approve of this action, and wrote a letter, signed by the mayor and ten of the aldermen, to their sitting members, Sir Thomas Stapleton and Mr. Lee, stating that this offer had been made, but that they would prefer to re-elect their old members if they would advance a sum to discharge the city's debts. Stapleton and Lee, who had already helped the city,[9] replied:

> we think it incumbent on us to return you thanks for the preference you are generously pleased to give us of purchasing your corporation; but as we never intend to sell you, so we cannot afford the purchase.

On these facts being reported to the House the signatories of the letter were committed to Newgate. After a few days' imprisonment they were discharged with a reprimand from the Speaker. In reprimanding them, the Speaker stated views as to the evil

[1] § 3. [2] §§ 5 and 6. [3] § 7.
[4] § 9. [5] H.C.L. iii 253.

[6] For an order of the House on the subject of bribery in 1677 see Marvell, Works ii 538, cited vol. vi 246 n. 4.

[7] This account is taken from Parlt. Hist. xvi 397-402.

[8] This was the current price of two seats, below 576.

[9] In the letter of the mayor which made this offer there is a P.S. thanking their members for their "late generous benefaction," Parlt. Hist. xvi 399.

effects of bribery on the House of Commons and the constitution [1] which, no doubt, reflected the spirit of the statutes directed against it, but were wholly disregarded by the greater part of the House on whose behalf he spoke.[2] In 1770 a flagrant case of bribery at New Shoreham was the occasion of an Act which disfranchised the guilty persons, and added to the electorate the freeholders of the adjacent hundreds.[3] Similar measures were taken with Cricklade in 1782,[4] with Aylesbury in 1804,[5] and with East Retford in 1830;[6] and in 1821 Grampound was entirely disfranchised, and its right to elect two members was transferred to Yorkshire.[7]

But neither the Acts of Parliament, nor the sporadic interventions of the House of Commons, could stem the tide of corruption. Though individuals were occasionally committed to prison by the House of Commons,[8] and though abortive proposals were made for new legislation,[9] nothing substantial was ever effected in the eighteenth century. Boroughs stipulated sometimes for cash, sometimes for benefits to the town, sometimes for orders for local industries.[10] In 1754 Tewkesbury made it known that "no persons could be elected unless they would advance £1,500 each for the repair of the roads";[11] and many other towns effected improvements in their public buildings in this way.[12] In fact, Tewkesbury in 1754 was more public spirited than many boroughs, for it warned the electors that they were not to expect anything from the candidates. Generally both the town and the individual electors expected to benefit. The electors expected to be entertained[13] and paid for their votes when an election took place, and, in many cases, to be cared for in the

[1] "A more enormous crime you could not well commit; since a deeper wound could not be given to the constitution itself, than by the open and dangerous attempts which you have made to subvert the freedom and independence of this House. The freedom of this House is the freedom of this country, which can continue no longer than while the votes of the electors are uninfluenced by any base or venal motive," Parlt. Hist. xvi 400.

[2] It is said that while these proceedings were pending the corporation completed the sale of its representation to the duke of Marlborough and the earl of Abingdon, Walpole, Memoirs of George III iii 153-154; Walpole says, Letters (ed. Toynbee) vii 168, that the corporation "rather deserved thanks for not having taken the money for themselves," a view which represented the opinion of the ordinary man of that day; in 1782, on the debate on the bill for adding to the electorate at Cricklade, Lord Loughborough is reported as saying, "that the franchise of voting was daily bought and sold, and was consequently a species of property," Parlt. Hist. xxii 1391.

[3] 11 George III c. 55. [4] 22 George III c. 31.

[5] 44 George III c. 60. [6] 11 George IV and 1 William IV c. 74.

[7] 1 and 2 George IV c. 47.

[8] Erskine May, Constitutional History i 339. [9] Ibid 342-343.

[10] Porritt, The Unreformed House of Commons i 157-161.

[11] Ibid 161-162. [12] Ibid 163-164.

[13] In 1714 Lord Radnor wrote: "the Corporation of Bodmin dines with me next Fryday. I expect about 400 persons that day. I had that number last time, and there did not goe home five sober of the whole number," Calendar of Treasury Papers 1714-1719, 39.

intervals between elections.[1] Conversely, if a borough showed independence these benefits were withdrawn.[2] It was by these methods that persons were able to establish, occasionally a complete control over, and sometimes a predominating influence in, a borough—that they were able to become borough patrons, who could return themselves, or sell to another person the privilege of representing the borough. Mr. Namier has calculated that in 1761 fifty-one peers nominated the members, or influenced the elections, for one hundred and one seats; and that fifty-five commoners nominated the members, or influenced the elections, for ninety-one seats. If to this total there is added thirty-two seats which were under the immediate control of the government, a total of two hundred and thirty-four seats is reached—"almost half the representation of England."[3] If we analyse the methods by which this control was gained, and the nature of the bargains struck by these borough patrons, it will be apparent that the statutes against bribery and corrupt practices were almost a dead letter, and that it required a very flagrant case to stir the House of Commons to denounce practices of which very many members of the House had themselves been guilty. Horace Walpole justly said of the Oxford episode in 1768 that, while members "were separately pursuing the same traffic, much of their public time was consumed in stigmatizing the practice."[4]

There was a market price for seats, which naturally varied with the chance of the duration of a Parliament. In 1761 the average market price was £2,000.[5] But, as Mr. Namier has pointed out,[6] "the price which a candidate paid at an election for a 'ready-made seat' to the patron or manager of a borough,

[1] Namier, Structure of Politics ii 430-433 for an instructive analysis of the sums spent on Grampound and its electors between 1748 and 1754; see Bagehot, Essays on Parliamentary Reform 147 for Sheridan's expenses for the six years during which he represented Stafford.

[2] Newcastle showed his resentment when his candidate was rejected at Lewes in 1768—"the tenants who had voted for Colonel Hay, the successful candidate, were given notice to quit at Michaelmas. The constables at Lewes were informed that his Grace withdrew his interest from the town, that he would no longer contribute to their entertainments, as he had been accustomed to do, that plate which they had on loan from him for use on ceremonial occasions was to be returned. He would refrain from his usual endeavours to have the assizes fixed at Lewes. All tradesmen who had dared to vote against him were forthwith to lose his custom. If there were rewards for compliance, there was the risk of incurring severe penalties in case of disobedience," Turberville, House of Lords in the XVIIIth Century 469.

[3] Structure of Politics, i 176-182; for other estimates see Erskine May, Constitutional History i 361-362; in 1793 the petition of the Friends of the People presented by Grey, Parlt. Hist. xxx 787, stated that eighty-four persons returned one hundred and fifty-seven members, that seventy men by their influence secured the return of one hundred and fifty members, so that three hundred and seven members—a majority of the House—were returned to Parliament by one hundred and fifty-four persons, of whom forty were peers.

[4] Memoirs of George III iii 153.

[5] Namier, Structure of Politics i 203-205.

[6] Ibid 201-202.

was usually but a part of the cost involved in its control, and was seldom expected to reimburse all the expense which the patron was put to, year after year, in preserving his interest in the constituency." There were the standing expenses of management, which included all sorts of payments and the gifts of other benefits to voters, to the borough and to the officials of the town, and, of course special expenditure at an election.[1] Even then the patron did not always succeed in returning his candidate. Bubb Dodington complained bitterly when, in 1754, he lost a seat at Bridgewater in spite of an expenditure of £2,500.[2] The duke of Newcastle—the prince of borough mongers—spent his life and a large part of his fortune in this sort of electioneering; but, after all his trouble and expense, he could only nominate to about twelve seats.[3] It is obvious that borough patrons did not go into the business to make a pecuniary profit by the sale of their seats [4]—in fact some of these patrons found that they could not afford the expense, to say nothing of the trouble, which the maintenance of their interest in a borough involved.[5] Both they, and the member who had bought the seat, expected to get a return for their trouble and expense in other ways. A consideration of what these other ways were, involves a consideration of the widespread use of influence and its effects upon the eighteenth-century constitution.

The widespread use of influence, and its effects upon the eighteenth-century constitution, and on the House of Commons.

In 1754 Bubb Dodington told Lord Dupplin that, before the death of Henry Pelham, he had entered into negotiations with Pelham for a reconciliation with the King and his ministers. "Mr. Pelham declared," says Dodington,[6] "that I had a good deal of marketable ware (parliamentary interest) and that, if I would empower him to offer it all to the King, without conditions, he would be answerable to bring the affair to a good

[1] Mr. Namier's analysis of the account of disbursements made by Roberts, who had been private secretary to Henry Pelham, "in respect of the interest at the borough of Grampound," is a good illustration of what was expected of a patron, Structure of Politics ii 430-433.

[2] Dodington's Diary 192. [3] Namier, Structure of Politics i 13.

[4] "No one ever tried to establish an electoral influence in Parliamentary boroughs with a view to making money, and whereas scores of big fortunes were sunk into Parliamentary boroughs, not a single one, even of moderate size, is known to have been acquired through them," ibid 201.

[5] In 1780 Humphrey Morice explained to Lord North that he had sold his estate and interest in the boroughs of Launceston and Newport to the duke of Northumberland on account of the trouble and expense which the maintenance of his interest involved—"the trouble of it not to say anything of the expense is more than Mr. M. can bear with a constitution much impaired by gout. . . . He lost a member last year after all the trouble and expense he had been at and notwithstanding the established interest he seems to have he may be worse off next time," ibid 251 n. 1. [6] Diary 208.

account: that, if this engagement had not been taken, the nature of the thing plainly spoke it. Service is obligation, obligation implies return." In that sentence, "service is obligation, obligation implies return," we have shortly expressed the accepted eighteenth-century theory which underlay the use of influence in all parts of the government, central and local. Much governmental service was unpaid service. Justices of the peace, sheriffs, lords lieutenant, and members of the Privy Council, received no salary for their services. But those services "implied a return." Similarly, at a Parliamentary election an elector was not bound to cast his vote; and if he did cast a vote for a candidate, he did a gratuitous "service" to that candidate, which "implied a return." *A fortiori* the service of a member in the House of Commons or of a peer in the House of Lords carried with it an obligation which also "implied a return" of another kind.[1] That return took many forms, sometimes the form of direct pecuniary benefit, but more generally, at any rate in the higher ranges of political life, the form of the use of influence to procure a lucrative post, sinecure or otherwise, a title, a step in the peerage, or a decoration. In fact it would not be going too far to say it was the judicious use of influence which kept in motion and co-ordinated the separate parts of the complicated machinery of the constitution.

All governments at all times depend on the use of influence. The method in which it is used will depend to some extent on the received code of political ethics; and the personnel of its beneficiaries will always depend upon the question whether the form of the government is monarchic, aristocratic, or democratic. All these forms of government, especially the democratic, which is apt to suffer from a self-righteousness born of ignorance, will be apt to denounce as corruption those methods of using influence which they do not employ. Since the eighteenth-century constitution was unique in that it combined monarchic, aristocratic, and democratic elements,[2] and in that Parliament was the predominant partner in it, it followed that the manner in which influence was used was also unique. Parliament was the centre of the constitution, and therefore the many forms which the exercise of influence took were determined by its position.

[1] J. Garth, "a Whig who after seventeen years in Parliament held neither place nor pension," said in 1757 in a letter to Newcastle, "I have ever apprehended it to be reasonable that those who dedicate their time and fortune to the service of the Government should be entitled to a share of the rewards that are in its disposal," Namier, Structure of Politics i 263; cp. Soame Jenyns's tract on Parliamentary Reform written in 1784, cited ibid i 265; and Pelham's speech in 1744 on a motion to double tax places and pensions, Parlt. Hist. xiii 1037.

[2] Below 714-716.

We have seen that the legal control which the central government was able to exercise over the local government was very slight; but that through the lords lieutenant, who were usually peers, privy councillors, and often holders of important offices in the state, a connection was established between the local government in the counties, and the House of Lords and the central government; and that through the justices of the peace, whose appointment lay largely in their hands, a connection was established with the House of Commons.[1] We have seen that in many of the moderate-sized boroughs the landed gentry got a control, which led these boroughs to return members of the same class as those who were justices of the peace in the counties.[2] This practice tended to establish some connection between the governing bodies in these boroughs and the House of Commons and the central government. In the larger towns, like London and Bristol, which were represented by the leading commercial men, these commercial men could be easily connected with the central government by means of contracts and other advantages which the central government was able to give to its supporters.[3] Thus influence—the influence of lords lieutenant over the county magistrates, the influence of lords lieutenant and the landed gentry who were county magistrates over elections to the House of Commons, the influence of the central government over commercial men—created links of a wholly conventional kind between the local and the central government.

We see the same phenomenon if we look at the connection between the House of Commons and the House of Lords, and between Parliament and the central government.

We have seen that many of the peers, by virtue of their position as large landowners, and by virtue of the controlling influence which they maintained in the smaller boroughs, were in a position to influence many elections to the House of Commons both in the counties and the boroughs;[4] and that the fact that the majority of the members of the two Houses belonged to the same landowning class created a substantial link between them.[5] The central government was in a position to influence many elections to the House of Commons and many members in both Houses. It had many places at its disposal—small and great. Small posts could be used to influence electors. Larger posts could be used to reward members of Parliament, patrons of boroughs, and peers. The Crown was the fountain of honour, and peerages and lesser titles were used to reward its supporters —Bubb Dodington's control of five or six boroughs made him

[1] Above 238-241. [2] Above 566.
[3] Above 107; Namier, Structure of Politics i 59-60.
[4] Above 576. [5] Above 557; below 628.

Lord Melcombe.[1] It could reward with government contracts its supporters among the commercial men.[2] Thus very substantial links were established between Parliament and the central government, which, as we shall see, had a great influence in determining the shape which the nascent cabinet took in the eighteenth century.[3] Of these effects which this system of influence had upon the relations between the House of Commons and the House of Lords, and upon the relations between Parliament and the central government, I shall speak in more detail later.[4] At this point we must look at its effects upon the constitution of the House of Commons.

The House of Commons, partly by reason of its exclusive control over finance,[5] and partly by reason of the fact that it represented all the most important national interests, was, even in the eighteenth century, the more powerful of the two Houses ;[6] and it was the existence of such a House which determined the main current of this widespread system of influence. Both constituencies and their voters must be managed by such material influences as contributions to municipal purposes, bribes, periodical payments, and gifts of small offices.[7] The patron who managed the borough expected to be rewarded by the Government. The member of Parliament who bought his seat expected to see his money back in the shape of an office or a decoration or a pension, and sometimes in the shape of an actual cash payment.[8] It is clear that, under this system, the government had great advantages. It had the command of a fund of influence with which nobody else could compete.[9] That was why George III was able to emancipate himself so quickly from the Whigs, and to create a party of his own men. We may wonder, indeed, why he was not more successful—why he did not succeed in completely dominating Parliament. That he did not succeed is due mainly to three causes.

[1] Above 58-59 ; below 633.
[2] Above 579.
[3] Below 629-630.
[4] Below 628-634.
[5] Below 585-588.
[6] Above 33, 34 ; below 618-619, 626.
[7] Above 575-576, 577.

[8] "The great number of offices of more or less emolument, which are now tenable by parties sitting in Parliament, really operate like prizes in a lottery. An interested man purchases a seat upon the same principle as a person buys a lottery ticket. The value of the ticket depends upon the quantum of prizes in the wheel," Rockingham Memoirs ii 339, cited Erskine May, Constitutional History i 373.

[9] Horace Walpole said, Letters (ed. Toynbee) xi 155-156, "surely you do not think that the influence of the crown on Parliament depends on the dry money it has to give! So far from it, the want of money was a principal cause of the American war. Contracts, commissions, and ten thousand other sorts of bribes infinitely exceed all the votes that are purchased by what the crown dispenses out of its own fob" ; Mr. Namier has proved the correctness of this statement ; he has shown that this fund of influence, and not the secret service money, was the principal means by which the support of members of the House of Commons was secured, Structure of Politics i 215 seqq.

In the first place, the existence of the traditional Whig and Tory parties kept alive an opposition. Under George I and George II, when the Crown identified itself with the Whig party, the Tory landowners formed the nucleus of an opposition which they financed.[1] It is true that, at the end of George II's reign, the line of demarcation between the parties was wearing very thin. But George III revived it in a new form. Opposition to the revived power of the Crown gave new life to a reconstituted Whig party, which gradually gained national support.[2] In the second place, the disastrous results of George III's American policy were the decisive factor in getting for the newly constituted Whig party this national support.[3] When they gained power they took care, as we have seen, to pass measures to diminish the opportunities of the King to regain by means of influence, many of the prerogative powers which he had lost.[4] In the third place, the House of Commons never ceased to represent the main currents of national opinion. Though it was influenced in many ways, it never ceased to be representative.[5] However completely under control a constituency might appear to be, that control was rarely permanent;[6] and the influence which kept a ministry together tended to grow weaker if it appeared to be losing its control over the House of Commons. As Bagehot has said,[7]

> a majority which is obtained by the employment of patronage . . . is combined mainly by *an expectation*. . . . At a critical moment this bond of union was extraordinarily weak. If the minister of the day should fail, he would confer favours no longer; the patronage that was coveted would pass into the gift of the minister who succeeded him. The expectation upon which a minister's strength under the old system of representation was based, varied, therefore, with the probability that he would succeed. It was most potent when it was certain that the minister would be victorious; it was weak and hesitating when it was dubious whether he might not be beaten and retire. In other words, that source of strength was prolific when it was not wanted; when it was wanted it was scarcely perceptible.

We have seen that the representative system of the eighteenth century, which worked under the guidance of this system of influence, sent to the House of Commons the ablest men in many different spheres of national activity;[8] and that the House of

[1] Above 58. [2] Above 102. [3] Above 107.
[4] Above 107, 524; below 635. [5] Above 568.
[6] Namier, Structure of Politics i 165-169; Mr. Namier says op. cit. at p. 165, "there were few places, such as Old Sarum, which could in unqualified terms be put down as absolutely and irrevocably under the command of one man, his heirs or assigns. In most cases 'control' meant merely a command so complete that it required exceptional negligence or ill luck on the part of the owner to be deprived of it. Still cases of that kind did occur."
[7] Essays on Parliamentary Reform 157-158. [8] Above 568.

Commons elected under these conditions was responsive to the educated public opinion of the day.[1] This system of influence did not, therefore, prevent the House from being both able and representative. But a constitution in which a representative assembly had, in some respects, the most important place, a constitution in which the powers of its various parts and its various officials were governed by the rule of law, was difficult to work—and the more so because it was a unique phenomenon in the political world. Two other connected effects of this system of influence helped to overcome these difficulties, and to make the House of Commons capable of filling the great place in the state which it had acquired. In the first place, it supplied an electoral machine; and, in the second place, it completed and gave a form to the system of party government which added enormously to the efficiency of the House of Commons.

(i) All systems of representative government need an electoral machine.[2] The peers and large landowners did then what the party organization does to-day—"the party organization finds and allocates the candidates just as much to-day as the territorial magnates did two centuries ago." It is true that the form of the inducements offered to voters to support a candidate is no longer the same. It is no longer a pecuniary inducement to an individual paid for by the Crown or by a territorial magnate.[3] It is no longer a sinecure place given to the territorial magnate who can control boroughs. It is now some "social service" (the policy of which is often as doubtful as its cost is certain) for which the minority of the richer tax-payers will have to find the money. We cannot afford to assume airs of self-righteousness in this matter of influence. Though sinecures are no longer provided at the expense of the public for the members of the class which governed in the aristocratic constitution of the eighteenth century, the class which governs under our modern democratic constitution provides for itself in other ways; and, as Sir John Fortescue has said, "the evil under the new governing class is about a thousand times as great as under

[1] Above 538.

[2] Turberville, The House of Lords in the XVIIIth Century, 476; as Mr. Turberville says, "it is probable that constituencies were more often represented by men with local interests and connexions than now. For the territorial magnate usually had a genuine solicitude for his own neighbourhood, and selected for its representation men who shared that solicitude"; Namier, Structure of Politics i 81, agrees with this view.

[3] Professor Basil Williams says of the duke of Newcastle: "his position very much resembles that of the head of a huge political organization in modern times. and the comparative restriction of his sphere of influence was more than counterbalanced in his case by the necessity of studying the idiosyncrasies of almost every voter in his constituencies, inasmuch as a system of personal bribery or influence requires more detailed attention than the attempt to persuade masses of voters to adopt a political programme," E.H.R. xii 454.

the old "[1]—a thousand times as great by reason not only of its expense, but also of its effects upon the moral and political sense of the nation and upon its economic strength.

(ii) This system of influence gave a form to the system of party government, which added enormously to the efficiency of the House of Commons. The points of difference between the Whig and Tory parties varied at different periods in the eighteenth century; and, in the middle of the century, the two parties differed but little in fundamentals.[2] But the party organization was still maintained; and the fact that the procedure of the House of Commons was a procedure which was designed to help an opposition,[3] enabled the opposition to make its voice heard. The fact that the members of both parties in the House belonged to the same governing class, the fact that they were agreed on fundamental matters, the fact that they were accustomed to accommodate one another both in the electoral struggles and in the conduct of the business of the state, prevented an embittered and merely factious opposition, which would have held up the essential business of the state.[4] At the same time, the fact that the opposition existed as an organized body, ensured a continuous and a reasoned criticism of the government's activities. Moreover, in the eighteenth century, the organization of the two parties was not so rigid that it stifled the individual initiative of the members of the House. Private members had many more opportunities than they have to-day of bringing forward measures and proposing motions; and there was more reality in the speeches and debates, for it was far more possible then than now that they would turn votes.[5]

The preservation and organization of the two historic parties on these lines had important effects upon the House of Commons. In the first place, the fact that discussion and criticism were focussed by it on important questions, either in Parliament or at contested elections, gave a political education to the nation which made it capable of judging between the

[1] Speaking of the sinecure offices, he says, "if it be thought scandalous, as well it may be, let it be remembered that the governing class always provides for itself out of the public purse, that it is doing so at this moment, and that the evil under the new governing class is about a thousand times as great as under the old," Papers of George III vi, xiii.

[2] Above 87. [3] Above 536, 537-538.

[4] "In the classic land of party government and party warfare, the great collective interests of the state have at all times been, expressly or by tacit consent, removed from the province of party," Redlich, Procedure of the House of Commons i 128-129; cp. above 537.

[5] As Mr. Namier has pointed out, Structure of Politics i 263, a pension or an office did not necessarily deprive a member of his independence—"it is well known that about 1750 even Cabinet Ministers could speak and vote against government measures; the one and only thing which place or office precluded was a 'formed opposition'"; below 637.

candidates who offered themselves for election. In the second place, it enabled the House of Commons to perform what had been its earliest and its most continuous function—the function of representing to the government the views of the governed upon its acts and its policy. In the third place, it gave the opposition as such a quasi-official position, which helped to smooth its relations with the government. The phrase "His Majesty's opposition" was not coined in the eighteenth century;[1] but the set of ideas connoted by it was the result of the relationship between the parties, which had been brought into existence as the result of the manner in which the constitution of the House of Commons had been settled in the eighteenth century, partly by the law and partly by this system of influence.

Unless the government had organized its supporters it could not have carried its measures. Unless the opposition had organized its supporters it could not have made its criticism felt either in the House or in the country. Unless both parties had agreed as to fundamentals the rivalry of two organized parties would have brought the government to a standstill. It was the way in which the House of Commons was constituted in the eighteenth century which enabled all these conditions to be fulfilled. The set of laws and conventions which determined the manner of men who were elected, the way in which they were elected, and the way in which the House was organized for business, determined the outstanding characteristics of the House in this century. It was the possession of these characteristics which enabled the Parliamentary government established by the Revolution to work successfully, and to win the approval of many statesmen and political thinkers both in England and on the Continent.[2] We shall now see that it was only a homogeneous House of politically educated men, well organized for the support and criticism of the government, which could have exercised the great powers possessed by the House of Commons, in such a way that it not only did not impair the efficiency of the executive government, but often increased its effectiveness.

(2) *Powers.*

The House of Commons in the eighteenth century was the predominant partner in the constitution. It had gained this position, and it held it, first by reason of its exclusive control over finance, and, secondly, by reason of its representative

[1] "The phrase originated (in 1826) in a half-derisive speech made by Hobhouse, afterwards Lord Broughton," see Porritt, The Unreformed House of Commons i 510.

[2] Above 7; below 714.

character. Its exclusive control over finance enabled it to criticize all the acts of the executive government, to stop projects of which it disapproved, to force the executive to adopt policies of which it approved, and to supervise the methods adopted to carry them out. Consequently it was able to insist upon the dismissal of ministers of whom it disapproved, and to compel the King to appoint ministers whom it would support. No doubt, as we have seen, the executive government had many means of influencing the House of Commons.[1] The influence of the executive government upon the House of Commons was, in quiet times, as great as or greater than the influence of the House of Commons on the executive government.[2] But, as we have seen, on matters which stirred the nation the House of Commons was able to exercise a decisive influence on the executive government.[3] The fact that it could exercise this influence was due largely to its representative character; and that character gave it a position of decisive importance in all matters relating to trade and commerce, in a matter which was closely allied to trade and commerce—the government of the colonies and India, and in all matters relating to local government. On all these matters it could speak with information and authority, and, consequently, could influence decisively the policy of the state, and initiate the legislation needed to carry out that policy. It was for these reasons that the House of Commons was by far the most active part of the Legislature. Much the greater part of the statutes, public, private or local, originated with it. We shall see that the part played by the House of Lords in legislation was by no means negligible. Important statutes were there initiated; and it had full powers, of which it made much use, to amend and reject the bills sent up to it from the House of Commons.[4] But, necessarily, it had not as a House the detailed knowledge which the representative character of the House of Commons gave to it.

I shall deal shortly with some of the important powers exercised by the House of Commons under the following heads: (i) Finance; (ii) Supervision of the Executive Government; (iii) Control of the Crown's choice of the Ministry or of Individual Ministers; (iv) Commerce; (v) The Colonies and India; (vi) Local Government.

(i) *Finance.*

We have seen that, at the close of the seventeenth century, the House of Commons had asserted an exclusive control over

[1] Above 579-580.
[2] Above 580; below 633.
[3] Above 538.
[4] Below 606-609.

finance, first as against the House of Lords, and secondly as against the King.[1] This exclusive control over finance was jealously guarded, because it was realized that upon it the predominant position of the House of Commons rested. This fact will be very apparent if we look at the manner in which this control was asserted as against the House of Lords and the King, and at some of the consequences of its successful assertion against them.

(*a*) *As against the House of Lords.*—We have seen that, though there was a substantial justification for the claim asserted by the House of Commons, that money bills could not originate in the House of Lords and could not be amended by that House, the House of Commons could produce little or no historical proof of its validity;[2] and we have seen that there was no justification for the practice of tacking measures, which the Lords disliked, to money bills, in order to force the Lords to pass them.[3] The House of Lords rightly protested against the latter practice,[4] and it seems to have been dropped after Anne's reign;[5] and, similarly, that House protested in 1716 against the use of the preamble of a money bill as a means of condemning the policy of political opponents.[6] But the House of Commons firmly adhered to its claim that the Lords could neither originate nor amend a money bill;[7] and it gave a very extensive interpretation to the bills which it accounted money bills.[8] Having regard to the slender historical justification for the claim of the House of Commons that the Lords could neither originate nor amend money bills, it is not surprising that protests were made against it from time to time. In 1732 the Lords rejected a proposal to amend the salt duty bill;[9] in 1740 Carteret said that the House had "never yet yielded to the House of Commons the sole and exclusive right of granting supplies, or that we have not a right to alter and amend those

[1] Vol. vi 250-254. [2] Ibid 250-251. [3] Ibid 251.

[4] In the address of the House of Lords to the Crown in 1704 on the commitment of the Aylesbury men, the House said of this practice, "by this method they assume to themselves the whole legislative authority, taking in effect the negative voice from the Crown, and depriving the Lords of the right of deliberating upon what is for the good of the kingdom." Parlt. Hist. vi 433; cp. Turberville, The House of Lords in the Reign of William III 194-195; The House of Lords in the XVIIIth Century 55, 57.

[5] Hallam, C.H. iii 142-143; in 1779 the House refused to class the bill for doubling the militia as a money bill, and took the Lords' amendments into consideration, Parlt. Hist. xx 1009-1018.

[6] Parlt. Hist. vii 288. [7] Bl. Comm. i 170.

[8] "Under which appellation are included all bills, by which money is directed to be raised upon the subject, for any purpose or in any shape whatsoever; either for the exigencies of government, and collected from the kingdom in general, as the land tax; or for private benefit, and collected in any particular district, as by turnpikes, parish rates, and the like," ibid.

[9] Parlt. Hist. viii 1057.

money bills they send up to us"; [1] and in 1778 [2] and 1782 [3] Shelburne contended that the House had this right. But, in spite of these protests, no serious efforts were made to contest a power which the House of Commons regarded, to use Burke's words, as "the holy of holies" and "the palladium of the constitution." [4] The House of Commons realized that its constitutional position would be jeopardized if it receded an inch from this claim; and that, in consequence, the balance of power in the constitution would be upset. In 1740 Walpole clearly and explicitly explained these dangers, and his words explain and justify the attitude to which the House then and ever since has always rigidly adhered. He said: [5]

> The only way to preserve the national liberty is to suffer every branch of the Legislature to have its due influence in all public occurrences. Sir, if we should once suffer the Lords to be associated in our right of granting money, this branch of the Legislature would be a mere cypher . . . the House of Lords have many privileges, they enjoy many rights, that are inherent to them as a body, and unalienable to their persons. They are the supreme court of judicature; the highest council of the nation; they have a right to put a negative upon our proceedings; their persons are at all times sacred, and it is even in their power to prevent our making a bad use of our privilege of granting money, by throwing out the Bill, if they shall find that we have been more lavish than the circumstances of the nation can admit of. And yet, Sir, not all this power in a House of Lords, great as it is, can endanger the balance that poizes the constitution, if we shall still assert our right of granting money. But the moment we admit of this power being disputed or shared with us, then the balance of the constitution is endangered, and the properties of the people taken out of the hands of their natural guardians.[6]

Unfortunately this reasoning is no longer applicable, to a constitution in which all thought of preserving a balance has long ago disappeared, and with it one of the strongest securities for national liberty

(*b*) *As against the King.*—We have seen that the plan adopted at the Revolution [7] of voting the King a civil list for his life, out of which he was expected to meet the ordinary expenses of the royal household and the civil service, was maintained all through

[1] Parlt. Hist. xi 486.

[2] Ibid xix 1049; he said, "until the claim after solemn discussion of this House is openly and directly relinquished, I shall continue to be of opinion, that your Lordships have a right to alter, amend, or reject a Money Bill, and to prevent an improper or oppressive tax being laid on the people and yourselves."

[3] Ibid xxiii 143.

[4] Ibid xvii 513; on this occasion the offending bill "was rejected *nem. con.*, and the Speaker tossed it over the table; several members on both sides of the question kicking it as they went out," ibid 515.

[5] Ibid xi 444.

[6] Blackstone put this reason for the exclusive right of the House of Commons into a different form, see below 618.

[7] Vol vi 253.

the eighteenth century.[1] The Crown, therefore, was dependent upon the House for any of the expenses of the royal household and the civil service which exceeded this annual sum; and for the whole of the expenses of the army and navy, for extraordinary expenditure in time of war, and for the grants needed to pay the interest on the national debt.[2] We have seen, too, that, as the eighteenth century proceeded, the old hereditary revenues of the Crown were nearly all surrendered in exchange for the grant of an annual sum for the life of the King, which was made at the beginning of each reign.[3] Thus the House of Commons gained practically complete control over finance as against the King. It is true that the King had control over his annual income, and that the patronage which resulted gave him a large influence over Parliament.[4] It is true that that influence was, as Blackstone had pointed out, greatly strengthened by the fact that the officers in the army and navy, and the increasing staffs of the government departments, especially the revenue departments, though paid for by money voted by Parliament, were all his servants and held their offices at his pleasure.[5] But it was necessary to come to Parliament for the money to pay the army, navy, and many of the civil servants. Therefore it was necessary to prove the necessity for the expenditure; and, as supplies so voted were always appropriated, it was not possible to use money so voted for other purposes.[6] It is true that the machinery of national accounting was very defective; but we have seen that reform began in 1780, when commissioners of Public Accounts were appointed.[7] The House of Commons could always demand to see the accounts; and each year the Chancellor of the Exchequer was obliged, when bringing forward his annual budget, to survey the state of the national finances, and submit his proposals to the leading landowners and commercial men in the nation. As against the King and his government, therefore, the financial control of the House of Commons was complete.[8] It was this control which enabled the House to supervise the whole field of the executive government.

[1] Above 483-484. [2] Vol. vi 253-254. [3] Above 483.
[4] Above 579-580. [5] Above 418.
[6] Redlich, Procedure of the House of Commons iii 160-169.
[7] Above 522.
[8] "The complete realisation of the idea of Parliamentary control reacted upon the whole organisation of financial administration, just as the vast extension of the latter determined the way in which the great task of modern Parliamentary government—*direct Parliamentary control over the whole of the national finances*—reached its present shape. The result of the whole process has been to establish in actual fact the vital principle of modern Parliamentary government—that of full sovereignty of the nation's representatives in disposing of the financial burdens borne by their constituents," Redlich, op. cit. iii 160.

(ii) *Supervision of the Executive Government.*

We have seen that the plan adopted at the Revolution for the settlement of the national finances gave the House of Commons the power to supervise and criticize all the activities of the executive government.[1] The Parliamentary history of the eighteenth century shows that the House made the fullest use of this power. There was no matter, whether connected with home or foreign affairs, with peace or war, with the colonies and India, with trade and commerce, with all the varied business of local government, which was not at some time or other considered by the House of Commons. And the procedure of the House gave abundant opportunities for the exercise of this power to supervise and criticize. All sorts of questions could be raised in debates on the budget, on the address, or on motions of private members; for, as we have seen, the procedure of the House was a procedure which favoured the opposition.[2] Historically, there was a good deal of truth in a statement made by Thomas Hanmer in 1717, that the law of the constitution was founded upon a suspicion of the actions of the executive government.[3]

It was the continuous exercise of these powers to supervise the activities of all parts of the government, which gave the House of Commons its great place in the eighteenth-century constitution. The knowledge that their actions were always open to the criticism of the House, prevented the ministers from pursuing courses of conduct which were wholly indefensible; and the debates, in which the ministers were put upon their defence, were an education to all the members of the House in the theory and practice of government. That, at any rate, was the opinion of Gibbon. I transcribe his words because they explain, more clearly than any number of concrete illustrations, all that was involved in these powers of supervision and criticism, and the manner in which the House rose to its opportunities. Gibbon said in his Autobiography:[4]

I assisted at the debates of a free assembly; I listened to the attack and defence of eloquence and reason; I had a near prospect of the characters, views, and passions of the first men of the age. The cause of government was ably vindicated by Lord North, a statesman of spotless integrity, a consummate master of debate, who could wield

[1] Vol. vi 254. [2] Above 536, 537-538.

[3] "I believe his majesty is too good to be suspected of any arbitrary designs. But yet there is a general suspicion, which I will never be afraid or ashamed to own; because it is a suspicion interwoven in our constitution; it is a suspicion upon which our laws, our Parliament, and every part of our government is founded; which is that too much power lodged in the Crown, abstracting from the person that wears it, will at some time or other be abused in the exercise of it, and can never long consist with the natural rights and liberties of mankind," Parlt. Hist. vii 521.

[4] This passage appears in a very shortened form in the Autobiographies of Gibbon, Memoir E 310.

with equal dexterity, the arms of reason and of ridicule. He was seated on the treasury-bench, between his attorney and solicitor-general, the two pillars of the law and state, *magis pares quam similes;* and the minister might indulge in a short slumber, whilst he was upholden on either hand by the majestic sense of Thurlow, and the skilful eloquence of Wedderburne. From the adverse side of the House an ardent and powerful opposition was supported by the lively declamations of Barré; the legal acuteness of Dunning; the profuse and philosophic fancy of Burke; and the argumentative vehemence of Fox, who, in the conduct of a party, approved himself equal to the conduct of an empire. By such men every operation of peace and war, every principle of justice or policy, every question of authority and freedom, was attacked and defended; and the subject of the momentous contest was the union or separation of Great Britain and America. The eight sessions that I sat in Parliament were a school of civil prudence, the first and most essential virtue of an historian.

The power of the House to supervise and to criticize was unlimited. But it was well recognized that it had no executive power. There was much debate in 1784 because it was thought that, by one of its resolutions, it had usurped the discretionary power given by a statute to the ministers of the Crown;[1] Pitt in 1784 said that he hoped "that it would never be contended, that the sovereign, in creating peers or choosing his ministers, must first ask leave of the House";[2] and Lord North in 1789 said that, though it was usual for Parliament to address the Crown to remove ministers, "it had never gone so far as to advise the Crown to appoint AB or CD ministers."[3] As we shall now see, it was precisely at the point indicated by Lord North that, during the eighteenth century, these powers of the House to supervise the executive government began to assume an executive character. Their exercise was beginning to exert a decisive influence upon the personnel of those responsible for its conduct.

[1] An Act relating to the East India Company had provided in effect that the Company should not, during the continuance of the Act, accept bills drawn by their officers in excess of £300,000 without the consent of the Lords of the Treasury; the House of Commons had resolved that the Lords of the Treasury ought not to give their consent till it was proved to the House that means could be provided for the payment of the bills when they fell due; this occasioned a debate in both Houses as to whether the House of Commons had not exceeded its powers, Parlt. Hist. xxiv 494-526, 526-571.

[2] Ibid 442.

[3] Ibid xxvii 1202; in 1784, on Lord Charles Spencer's motion for the removal of ministers, Dundas said, "let the House look well to its conduct this night, for this night it is about to decide what is the constitution of this country. The assumption of power and privileges which did not belong to it, has once proved the overthrow of this constitution; we are verging towards the same precipice again, we are claiming to ourselves the right of appointing ministers, we are disclaiming the nomination of his Majesty, without cause and without trial," ibid xxiv 373.

(iii) *Control of the Crown's choice of the ministry or of individual ministers.*

Before the Revolution of 1688, the only method by which the House of Commons could get rid of a minister whom it disliked, was to impeach him, that is, to accuse him of a criminal offence.[1] But, soon after the Revolution, it became clear that the Crown could not carry on the government with a minister or a set of ministers of whom the House of Commons disapproved;[2] and all through the eighteenth century ministers recognized that they could not carry on in the face of an adverse vote of the House of Commons. In 1739 Walpole said: "the approbation of this House is preferable to all that power, or even Majesty itself, can bestow; therefore when I speak here as a minister, I speak as possessing my powers from his Majesty, but as being answerable to this House for the exercise of those powers";[3] and he resigned as soon as it was clear that he no longer possessed the confidence of the House.[4] In 1779 North said that "whenever the majority of the House should disapprove of a minister's conduct, he must give way";[5] and he more than once insisted that the ministry was jointly and severally responsible for the measures taken, and must stand or fall together.[6] But these statements were a little difficult to reconcile with the orthodox view, that the appointment of ministers was a matter which belonged solely to the prerogative, with which the House had nothing to do;[7] for, if the House refused to work with any but a particular minister or set of ministers, the King was in effect compelled to appoint that minister or set of ministers. This was in practice recognized; but it was obscured in the eighteenth century by the influence which the King was able to exercise over Parliament—in normal times he could secure support for the ministers he selected.[8] But the logical consequence which followed from the need for continued approbation of the House of Commons—the consequence that the House could indicate authoritatively to the King the ministers he must choose—was stated by Fox in 1783.[9] It was inevitable that,

[1] Vol. i 383-384; vol. vi 120, 259-260.
[2] Ibid 261; Trevelyan, England under Queen Anne i 113-115.
[3] Parlt. Hist. x 946. [4] Above 76.
[5] Parlt. Hist. xx 1409.
[6] Speaking on a motion for censuring Sandwich, the first Lord of the Admiralty, he said, "such a vote could not be a censure merely of the first Lord of the Admiralty, but of all his Majesty's confidential servants. He himself was equally criminal with the noble earl; so was every other efficient member of the cabinet. . . . Indeed a case might happen, in which merely ministerially, the noble earl might be obliged to execute officially what he had previously disapproved of in council, by being overruled by a majority of the King's servants," ibid 198; cp. ibid 89.
[7] Above 590 n. 3. [8] Above 580.
[9] "It has been argued again and again that the King had a right to choose his own ministers. In that particular, he rested on the spirit of the constitution, and

as soon as the influence which the Crown was able to exercise over Parliament was diminished, this logical consequence of the dependence of the ministry, or of a particular minister, on the continued support of the House would clearly emerge. But of this matter, and of the causes which retarded its recognition all through the eighteenth century, I shall speak more fully when I deal with the relations between Parliament and the Executive.[1]

(iv) *Commerce.*

We have seen in preceding chapters of this History that the group of statutes which regulate commercial matters, domestic and foreign, and matters connected therewith, has, from the earliest period in our Parliamentary history, been the largest group of statutes.[2] It has always been the largest group of statutes because the problem of regulating commerce is intimately related to many different sides of the national life—to the finance of the state, to its foreign policy, to national defence, to the supply of food, to the fostering of native industries, to wages and prices, to the relations between employers and employed. We have seen that, at the close of the seventeenth century, commerce and industry were developing on capitalistic lines,[3] that the commercial men were gaining increased political power,[4] and that, in consequence, economic theory was developing.[5] For these reasons many of the mediæval laws which regulated commerce and industry were beginning to be reconsidered, and changes in the law were being advocated, which would give more freedom to commercial men in the conduct of their trades.[6] All through the eighteenth century English commerce and industry were expanding, and, in the latter part of the century, they were being revolutionized.[7] Since, under these circumstances, the power of the commercial men in the House of Commons continued to increase, since it was generally recognized that the prosperity of all branches of industry was interdependent, commercial matters aroused the interest of all sections of the House of Commons, and were discussed in much detail and with great intelligence, not only by the commercial men, but also by the landowners.

not on the letter of it; and grounding his opinion on the spirit of the constitution, he ever had, and ever would maintain, that his Majesty, in his choice of ministers, ought not to be influenced by his personal favour alone, but by the public voice, by the sense of his Parliament, and the sense of his people. An administration in which that House did not place confidence was such an administration as it was unsafe to lodge the government of this country in at this crisis. . . . The personal influence of the Crown was not the ground for a minister to stand upon," Parlt. Hist. xxiii 596.

[1] Below 629-643. [2] Vol. ii 459-473; vol. iv 314-407; vol. vi 313-360.
[3] Ibid 341, 345-346. [4] Ibid 333-334. [5] Ibid 355-360.
[6] Ibid 341, 346-349, 356-360. [7] Above 69; vol. xi 390-392.

Burke said in 1752 that a member of Parliament "could do more by figures of arithmetic than by figures of rhetoric"; [1] and Lecky has remarked upon the fact that, during the ministries of Walpole and Pelham, debates upon financial and commercial matters excited the greatest interest amongst all the different types of members of the House of Commons.

> The increase of the national debt, the possibility and propriety of reducing its interest, the advantages of a sinking fund, the policy of encouraging trade by bounties and protective duties, the evils of excise, the reduction of the land tax, the burden of continental subsidies, were among the topics which produced the most vehement and the most powerful debates.[2]

This description of the Parliamentary debates was not quite so true of the ministries which succeeded those of Walpole and Pelham. But the fact that, all through the century, it retained a considerable amount of truth, is obvious from a very cursory reading of the debates both of the House of Commons and the House of Lords. All classes of the nation were interested in commercial questions, with the result that,

> in the eighteenth century detailed economic information and sound economic speculation are found even in quarters where one would hardly have expected them. In 1754 Newcastle transmitted to William Murray (subsequently Lord Mansfield) two papers on financial matters "from two country gentlemen, Mr. Campion and Mr. Page . . . the one from an old man of seventy-four who never was above one year and a half in busyness and that forty years ago, the other from a clerk in the South Sea House in the year 1720, retired and settled in the country, now for near thirty years." . . . Adam Smith was not a lonely figure in his time . . . as can be seen from the correspondence of James Oswald, Gilbert Eliot, or William Mure, all three members of Parliament.[3]

Because commercial questions of all kinds excited the interest of all types of members of Parliament, they were keenly and intelligently discussed in the House of Commons. The fact that they excited this interest and were submitted to this discussion was due mainly to two causes. It was due, in the first place to what had been a marked characteristic of English society' ever since the Tudor period, and perhaps even earlier,—the presence of a considerable flexibility in class distinctions.[4] No doubt there were marked class distinctions. As a general rule the highest honours in the state were not given to commercial men.[5] But the junior members of the noble families, and of the families of the landed gentry, adopted commercial careers,[6] and heiresses of the commercial men married into noble families.[7]

[1] Prior, Life of Burke i 38, cited Lecky, History of England ii 44.
[2] Lecky, History of England ii 44.
[3] Namier, The American Revolution 39.
[4] Vol. ii 464; vol. iv 402-407. [5] Namier, Structure of Politics i 19 n. 1.
[6] Namier, The American Revolution 9. [7] Ibid 10-11.

English society in the eighteenth century avoided the evils which flow from too rigid a distinction between classes, and the equally great evils which flow from a disregard of all class distinctions. The result was that commercial questions, on which the prosperity and power of the nation depended, were discussed in all their bearings by the men who, by reason of their wealth and ability, were most interested in, and most capable of arriving at, sound conclusions. Secondly and consequently, it was due to the fact that purely economic considerations were never allowed to outweigh larger national considerations.[1] Sea-power, the needs of national defence, the needs of all classes, were taken account of, as well as the need to increase the material wealth of individual traders or groups of traders. The commercial men, though powerful in the House of Commons, were not all powerful. Dr. Scott has pointed out that the success of the joint stock companies of the late seventeenth and early eighteenth centuries was largely due to the fact that they were not exclusively managed by the merchants. On their boards of management there was a "combination of the specific and detailed knowledge of the traders with the broad outlook of the men of affairs."[2] It was this same combination which was brought to bear upon the discussion of commercial questions in the House of Commons.

We shall now see that the same two causes will help us to understand the manner in which the House of Commons approached the problems set to it by the expansion of England in this century; for these problems were, all through the century, thought of in terms of commerce.

(v) *The Colonies and India.*

Many of the American colonies had been settled by trading companies;[3] and trade with the Levant, with Africa, and with India had been founded and was at first controlled by these companies.[4] Many of these companies were given by their charters exclusive trading privileges and governmental rights;[5] and the East India Company, in order to exploit these privileges amidst warring tribes and European rivals, which were fighting for supremacy over the corpse of the Mogul empire, "happed into a rulership of the Indies."[6] Many of these companies disappeared when the colonies which they had founded became political societies;[7] and the *raison d'être* of some of them disappeared when, as in the case of the African company, the state

[1] Vol. xi 409, 434, 451, 464.
[2] Scott, Joint Stock Companies i 443-444, cited vol. viii 213.
[3] Vol. viii 209; vol. xi 44.
[4] Vol. viii 209; vol. xi 64, 139.
[5] Vol. viii 201-202, 209-210.
[6] Maitland, Political Theories of the Middle Age x; vol. xi 148-152.
[7] Vol. viii 210 and n. 4; vol. xi 44-45, 64.

took over those duties of maintaining fortifications and defence, in return for which they had been given governmental and trading privileges.[1] With these developments, and with the consequent rise of a body of colonial constitutional law, I shall deal later in this chapter.[2] But, as in the sixteenth and seventeenth centuries,[3] so during the greater part of the eighteenth century, it would be true to say that it was from the commercial point of view that the House of Commons regarded the colonies and India. It was a one-sided point of view; and it led to mistakes which imperilled our dominions in India,[4] and, by helping to obscure the issues between ourselves and the American Colonies, it led to the loss of those colonies.[5]

But we shall see that, all through the century, the House of Commons was gradually learning that the colonies and India could not be thought of wholly in terms of commerce. At the end of the century it was beginning to realize that it was politically responsible for the welfare of a great and growing empire. The impeachment of Warren Hastings brought home to the House and to the nation its duties and responsibilities in a dramatic manner; [6] and the measure of toleration for Roman Catholicism secured to Canada by the Quebec Act of 1774,[7] showed that these duties and responsibilities had widened the outlook of the House of Commons. "Was not Great Britain bound," said Flood in 1787,[8] "to take care of the interests of every part of the empire? The Parliament of Great Britain was the imperial Parliament. Was it not, then, the indispensable duty of that Parliament in every great national measure to look to the interests of the empire, and to see that no injurious consequences followed to the peculiar interests of any part of it." There can be no doubt that the many discussions on colonial legislation, and the constant need to listen to the representations of the colonies [9] were broadening the outlook of the House, and making it realize that it was the predominant partner in an "imperial Parliament."

(vi) *Local government.*

Of this growing empire the British Isles were the heart and centre; and all the efforts of the House of Commons to promote

[1] Vol. viii 209-210.
[2] Vol. xi 229 seqq.
[3] Vol. iv 339-340; vol. vi 320.
[4] Vol. xi 154.
[5] Vol. xi 81-83, 104-105.
[6] Above 122; vol. xi 227.
[7] 14 George III c. 83 § 5; Lecky, History of England iv 169.
[8] Parlt. Hist. xxvi 467.
[9] Thus in 1749 petitions against the American Paper Money Bill were presented by the agents for Connecticut, Pennsylvania, Rhode Island, Massachusetts Bay, South Carolina, and New York; and counsel for the agents of Connecticut, Pennsylvania, and New York, were heard, as the result of which the bill was much altered and finally dropped, ibid xiv 563.

its safety, its well-being, and its expansion, would have been useless, if it had not maintained a system of local government which kept the peace, which saw to it that the law was obeyed, which enabled its citizens to cultivate the land, to trade and to manufacture, which provided an organization both for the suppression of rogues and vagabonds and for the relief of poverty. We have seen that the system of local government attempted all these things ; [1] and though its efficiency was not great as compared with our modern standards, it was, on the whole, probably as efficient as that of any other European country.[2] But we have seen that it could not have been adapted to the new needs of the century without much legislation—legislation which took the form of many general and many more local statutes.[3] This legislation succeeded in adapting a very mediæval system of local government to modern needs ; and though it produced a very complex system, it was a system which worked fairly well, until the relatively static conditions, which prevailed during the greater part of the eighteenth century, were changed by the coming of the industrial revolution.[4] It was the intimate relations which the members of the House of Commons had with the working of the local government, both in the country and in the towns, which enabled the House of Commons thus to adapt the mediæval system of local government, which the eighteenth century had inherited, to the needs of the day.[5] As justices of the peace its members had a very practical acquaintance with local problems ; and so while they were being taught to think imperially upon questions of domestic and foreign and colonial policy, they never lost sight of those problems of local government, upon which, in the last resort, the well-being of the whole body politic depended. The fact that the House of Commons was composed of men who possessed the power, the will, and the intelligence to deal effectively with both local and national problems was, as we shall now see, the secret of the great position which it held in the eighteenth-century constitution.

(3) *Constitutional position.*

That the House of Commons in the eighteenth century was an efficient body, of which all classes in the nation were proud, is proved by the verdict of many lawyers and publicists, English and foreign, who studied the British constitution.[6] Its attainment of this position was due to several causes. It was due, in the first place, to the character of the relations of the members of the House of Commons to their constituents ; in the second place, to the manner in which it helped to secure both efficiency

[1] Above 159-187. [2] Above 336-337. [3] Above 159-195.
[4] Above 336-337 ; vol. xi 390-391. [5] Above 241-242. [6] Below 714.

in the central government and the liberty of the subject; in the third place, to the fact that, while preserving the flexible class distinctions of earlier centuries, it helped to adapt those class distinctions to new conditions, in such a way that the property and the intelligence of the nation were adequately represented; in the fourth place, to the fact that, though it had become the predominant partner in the constitution, it did not question the independent position and the powers of the other partners in that constitution. Let us glance rapidly at the effect of these characteristics of the eighteenth-century House of Commons upon its constitutional position.

(i) *The relations of the members of the House of Commons to their constituents.*

At all periods of English history these relations have been close. So long as wages were paid to members by their constituents,[1] members kept their constituents informed of the proceedings in Parliament.[2] The petitions, from which many of the enactments of the mediæval Parliaments originated, came from the constituencies.[3] From the sixteenth century onwards it was recognized that members were especially bound to look after the business in which their constituents were interested.[4] They were ready to receive instructions from them, both as to the local business of their constituencies and upon matters of national policy.[5] For instance in 1733 Hervey tells us that "most of the boroughs in England and the City of London itself sent formal instructions by way of memorials to their representatives, absolutely to oppose new excises and all extensions of excise laws"; [6] and, after Walpole's fall, more than forty constituencies instructed their members to vote for a strict enquiry into Walpole's administration, triennial Parliaments, and a pension and place bill.[7] The practice of giving instructions to constituents was frequent during the contest of the House of Commons with Wilkes, and during the American war of independence; but it seems to have died out shortly afterwards,[8] partly in consequence of the stand made by Burke against it.[9] Occasionally pledges were demanded of members, but this was rare before 1832.[10] In fact, although members kept up intimate relations with their constituents, though they were never indifferent to the great waves of public opinion, especially when

[1] Vol. iv 93-94.
[2] Porritt, The Unreformed House of Commons i 257-258.
[3] Ibid 258. [4] Ibid 261-263. [5] Ibid 263-268.
[6] Hervey, Memoirs i 162-163, cited Porritt, op. cit. i 267.
[7] Porritt, op. cit. i 268. [8] Ibid 270-271.
[9] Below 599; Lecky, History of England iii 410.
[10] Porritt, op. cit. i 271-272.

a general election was approaching,[1] they maintained a very considerable freedom to vote for the policies, which, after the debates in the House, seemed to them to be best. The House of Commons was not, in the eighteenth century, a mere machine to register the votes of its members in accordance with a programme determined upon outside the House. The members themselves determined policy; and party discipline inside the House, and pressure outside the House, did not then render debates superfluous, by disabling members from deciding questions upon their merits.[2]

This independence of outlook was due to the fact that, from the end of the sixteenth century onwards, it was realized that the House of Commons, by virtue of its powers to discuss all questions of national policy, was not merely an assemblage of delegates deputed by its constituents to further the interests of their constituencies, but an assemblage of persons charged with the duty of deciding, by means of the information placed before them, and in the light of the debates upon that information, upon the measures which would further the interests of the nation. As early as 1571, in a debate on a bill to enforce Henry V's statute that only resident burgesses should be chosen, it was said that "the whole body of the realm, and the good service of the same, was rather to be respected, than the private regard of place privilege or degree of any person."[3] This, as Hallam has said, is perhaps the earliest assertion of the principle that "each member of the House of Commons is deputed to serve, not only for his constituents, but for the whole kingdom."[4] The fact that the qualification of residence was allowed silently to lapse,[5] shows that this view of the relation of a member of the House of Commons to his constituents was gaining ground. It was stated categorically by Coke;[6] and Locke emphasized the necessity, not only for freedom of choice in the electors, but also for freedom of action on the part of the elected.[7] Blackstone

[1] Porritt, op. cit. i 273-281; above 538.

[2] Below 600-601.

[3] D'Ewes, Journals 168.

[4] "This a remarkable and perhaps the earliest assertion, of an important constitutional principle, that each member of the House of Commons is deputed to serve, not only for his constituents, but for the whole kingdom; a principle which marks the distinction between a modern English Parliament and such deputations of the estates as were assembled in several continental kingdoms; a principle to which the House of Commons is indebted for its weight and dignity, as well as its beneficial efficiency," Hallam, C.H. i 267.

[5] Above 552 n. 10.

[6] "And it is to be observed, though one be chosen for one particular county or borough, yet when he is returned, and sits in Parliament, he serveth for the whole realm, for the end of his coming thither, as in the writ of his election appeareth is general," Fourth Instit. 14.

[7] "The people having reserved to themselves the choice of their representatives as the fence to their properties, could do it for no other end but that they might always be freely chosen, and so chosen, freely act and advise as the necessity of the

restated the principle laid down by Coke ; [1] and Burke, differing from his colleague in the representation of Bristol, who had promised to be bound by all the instructions of his constituents, gave in 1774 the classical exposition of the relations which ought to subsist between members and their constituents.[2] He said :

It ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him ; their opinion, high respect ; their business, unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions, to theirs ; and above all, ever, and in all cases, to prefer their interest to his own. But his unbiassed opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he does not derive from your pleasure ; no, nor from the law and the constitution. They are a Trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgment ; and he betrays, instead of serving you, if he sacrifices it to your opinion. . . . Government and legislation are matters of reason and judgment, and not of inclination ; and what sort of reason is that, in which the determination precedes the discussion . . . when those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments ? To deliver an opinion is the right of all men ; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear ; and which he ought always most seriously to consider. But *authoritative* instructions ; mandates issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience,—these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution.

Following Blackstone,[3] Burke then pointed out that Parliament was not a congress of ambassadors representing hostile interests, but "a deliberative assembly of *one* nation, with *one* interest, that of the whole." "You choose," he said, "a member indeed ; but when you have chosen him, he is not member of Bristol, but he is a member of Parliament."

Burke's exposition had a good deal to do with the disuse of those instructions to members, which were very common during the Wilkes' controversy.[4] It truly and eloquently set

commonwealth and the public good should, upon examination and mature debate, be judged to require. This, those who give their votes before they hear the debate, and have weighed the reasons on all sides, are not capable of doing," Two Treatises of Government Bk. II § 222.

[1] "Every member, though chosen by one particular district, when elected and returned serves for the whole realm. . . . And therefore he is not bound, like a deputy in the united provinces, to consult with, or take the advice of, his constituents upon any particular point, unless he himself thinks it proper or prudent so to do," Comm. i 159.

[2] Speech to the Electors of Bristol, Works (Bohn's ed.) i 446-447.

[3] Above n. 1.

[4] Above 597 ; see Parlt. Hist. xxiii 1013, for a strong statement and an application of Burke's view made in 1783.

forth what, from the sixteenth century onwards, has been the undoubted law of the constitution; and the law as thus stated has been reaffirmed in this century by the court of Appeal [1] and by the House of Lords.[2] The fact that this settlement of the question of the relation of members of the House of Commons to their constituents, was a principal cause of the great position to which the House attained in this century, is clear from the effect upon the prestige of the House of its relaxation in these latter days.

(ii) *The manner in which the House of Commons secured both efficiency in the central government and the liberty of the subject.*

We have seen that the fact that the Executive might be called upon to defend its measures in the House of Commons, made it impossible for the Crown to appoint wholly incompetent servants.[3] moreover, the fact that its measures were submitted to a critical discussion by some of the ablest men in the nation, showed up weak spots, and therefore improved the quality of those measures. The ministry might have a majority upon which it could depend; but it could never be wholly indifferent to criticism which was obviously reasonable. This is very clearly explained in a conversation at the Literary Club in 1778, which is reported by Boswell. He distinguishes some of the speakers by initial letters; and there is little doubt that E stands for Edmund Burke. But it is doubtful which of the members of the club are signified by the other letters.[4] The relevant part of the conversation is as follows: [5]

R. Mr. E. I don't mean to flatter, but when posterity reads one of your speeches in Parliament, it will be difficult to believe that you took so much pains, knowing with certainty that it could produce no effect, that not one vote could be gained by it. *E.* Waiving your compliment to me, I shall say in general that it is very well worth while for a man to take pains to speak well in Parliament. A man who has vanity, speaks to display his talents; and if a man speaks well, he gradually establishes a certain reputation and consequence in the general opinion, which sooner or later will have its political reward. Besides, though not one vote is gained, a good speech has its effect. Though an act which had been ably opposed passes into a law, yet in its progress it is modelled, it is softened in such a manner, that we see plainly the Minister has been told, that the members attached to him are so sensible of its injustice or absurdity from what they have heard, that it must be altered. *Johnson.* And, Sir, there is a gratification of pride.

[1] Osborne v. Amalgamated Society of Railway Servants [1909] 1 Ch. at pp. 186-187 *per* Fletcher Moulton L.J., and at pp. 194-198 *per* Farwell L.J.
[2] S.C. [1910] A.C. at pp. 110-116 *per* Lord Shaw.
[3] Above 7.
[4] Life of Johnson (ed. G. B. Hill) iii 230 n. 5.
[5] Ibid iii 233-235.

Though we cannot out-vote them, we will out-argue them. They shall not do wrong without its being shown both to themselves and to the world. *E.* The House of Commons is a mixed body. (I except the Minority, which I hold to be pure [smiling] but I take the whole House.) It is a mass by no means pure ; but neither is it wholly corrupt, though there is a large proportion of corruption in it. There are many members who generally go with the Minister, who will not go all lengths. There are many honest, well-meaning country gentlemen who are in Parliament only to keep up the consequence of their families. Upon most of these a good speech will have influence. *Johnson.* We are all more or less governed by interest. But interest will not make us do everything. In a case which admits of doubt, we try to think on the side which is for our interest, and generally bring ourselves to act accordingly. But the subject must admit of diversity of colouring ; it must receive a colour on that side. In the House of Commons there are members enough who will not vote what is grossly unjust or absurd. No, Sir, there must always be right enough, or appearance of right, to keep wrong in countenance. *Boswell.* There is surely always a majority in parliament who have places, or who want to have them, and who therefore will be generally ready to support government without requiring any pretext. *E.* True, Sir, that majority will always follow

Quo clamor vocat et turba faventium.

Boswell. Well now, let us take the common phrase Placehunters. I thought they had hunted without regard to anything, just as their huntsman, the Minister, leads, looking only to the prey. *J.* But taking your metaphor, you know that in hunting there are few so desperately keen as to follow without reserve. Some do not choose to leap ditches and hedges and risk their necks, or gallop over steeps, or even to dirty themselves in bogs and mire. *Boswell.* I am glad there are some good, quiet, moderate political hunters. . . . *R.* What would be the consequence, if a Minister, sure of a majority in the House of Commons, should resolve that there should be no speaking at all upon his side ? *E.* He must soon go out. That has been tried ; but it was found it would not do.

At the same time the House of Commons was careful to guard against the danger of sacrificing the liberty of the subject to governmental efficiency. This is clear from the general warrant cases,[1] from the frequent protests which were made against the powers given by statute to the officers of the customs and excise,[2] and from the jealousy of a permanent standing army which is so marked a feature in the Parliamentary history of this century.[3]

(iii) *The fact that, while preserving class distinctions, the House of Commons adequately represented the property and intelligence of the nation.*

We have seen that the landed gentry, the commercial men, and the representatives of the army, the navy, and the law,

[1] Above 515 ; below 659-672. [2] Above 419, 454.
[3] Above 380.

formed separate groups in the House of Commons.[1] We shall see that the peers formed a very separate class.[2] But all these class distinctions were very flexible ;[3] and their representatives, who met in the House of Commons, were able to work together, and, with the help of the knowledge which each class possessed, both to introduce necessary changes in the law, and to offer a reasoned criticism on the proposals laid before them by the King's ministers.[4] That they were able thus to work together was due to the fact that the very anomalous representative system, though indefensible in theory, did secure a real representation of all classes in the nation, and a predominant influence to wealth, and to the intelligence which far more frequently accompanies wealth than it accompanies poverty.[5] In fact as Lord Beauchamp said in 1785, there was much in the English constitution against which many a priori objections could be urged, but which nevertheless worked very well—trial by jury, for instance, and the position of the House of Lords as the supreme appellate tribunal.[6] He then pointed out that amongst the many institutions of this kind, the House of Commons was a striking example :[7]

> There is neither principle nor uniformity in the frame of this House, considered as an object of speculation and theory, yet we know, what alone is essential, that this rude and ill-constructed system of representation has answered every good purpose in practice ; that it has enabled us to make great struggles in war, and, at all times, to enjoy a greater share of political liberty than ever fell to the lot of any nation.

This is not surprising. Since the House of Commons in the eighteenth century represented both the wealth and intelligence of the nation, it contained within its walls the representatives of all the most important interests, and the leaders of thought, in the nation. From this point of view the representative system of the eighteenth century is superior to those which succeeded to it in almost exact proportion to the extent

[1] Above 566. [2] Below 622.

[3] "That in the eighteenth century a rise from a comparatively humble position was not impossible for a man even of merely good average abilities, who was prudent in the choice of party and assiduous in application, is seen by many examples ; perhaps best of all is the case of Charles Jenkinson who . . . gradually rose to Ministerial rank, and died as first Earl of Liverpool," Namier, Structure of Politics i 15.

[4] "A House, just as a team, has a joint personality, superior to that of the individuals who compose it ; and whilst its purpose dominates them, there can be little regarding of men. . . . The principle established in France by the Great Revolution and theoretically proclaimed in Germany in 1918—'a fair field to ability'—was realised, without reasoning, in the eighteenth century British Parliament," ibid 15-16.

[5] Bagehot, Essays on Parliamentary Reform 40 ; above 566.

[6] Parlt. Hist. xxv 730-731. [7] Ibid 731.

to which the franchise has become democratic. That representative system gave to the House of Commons so great a prestige that even a completely democratic franchise, though it has necessarily diminished that prestige, has not as yet succeeded in completely destroying it.

(iv) *The fact that the House of Commons, though the predominant partner in the constitution, did not question the independent position and the powers of the other partners in that constitution.*

We shall see that all political thinkers in the eighteenth century were agreed that the excellence of the British constitution was due to the fact that the powers of the state were shared by three partners—the Crown, Parliament, and the Courts; and to the fact that the powers of Parliament were shared between the House of Lords and the House of Commons.[1] It is clear that a constitution, of which this division of powers was the salient feature, could only work if these separate powers acted together; and that this combined action could only be secured if each part of the constitution respected the limits of its own powers, and acknowledged fully the powers of the other parts.[2] The House of Commons in the eighteenth century showed as much respect for the limits of its own powers as the King, the House of Lords, and the Courts. Though it was the predominant partner it never denied the independent powers of the other partners. We have seen that, though it reserved to itself the power of asking the King to dismiss his ministers, it acknowledged the power of the Crown to appoint them;[3] and that, though it asserted its right to criticize all the acts of the ministry, it never asserted a power to take executive action.[4] Similarly it recognized the necessity for the independent powers of the House of Lords. Fox, in the debate on the Quebec government bill in 1791, said[5] that no government could be

a fit one for British subjects to live under, which did not contain its due weight of aristocracy, because that he considered to be the proper poise of the constitution, the balance that equalized and meliorated the powers of the other two extreme branches, and gave stability and firmness to the whole. . . . In this country the House of Lords formed the aristocracy, and that consisted of hereditary titles, in noble families of ancient origin, or possessed by peers newly created, on account of

[1] Below 714-716.

[2] In 1785 Lord Beauchamp truly said of the theory that the excellence of the British constitution was due to the existence of these independent powers which checked one another, that harmony between, and united action on the part of, these powers, "can only arise from the scrupulous caution with which each branch of the constitution confines itself within its natural limits," Parlt. Hist .xxv 731.

[3] Above 590; below 637-638.

[4] Above 590.

[5] Parlt. Hist. xxix 409-410.

their extended landed property. He said that prejudice for ancient families, and that sort of pride which belonged to nobility, was right to be encouraged in a country like this; otherwise one great incentive to virtue would be abolished, and the national dignity, as well as its domestic interest, would be diminished and weakened.

And Pitt agreed with him. He said: [1]

Aristocracy was the true poise of the constitution: it was the essential link that held the branches together, and gave stability and strength to the whole; aristocracy reflected lustre on the Crown, and lent support and effect to the democracy, while the democracy gave vigour and energy to both, and the sovereignty crowned the constitution with authority and dignity.

The House of Commons recognized also that the independent powers of the courts were the greatest of all securities for the liberty of the subject; [2] and, in the constitution of the judicial system, it regarded the institution of the jury as giving to the judicial organization of the state that popular element which, in the political sphere, was supplied by the House of Commons.[3]

It was the fact that the House of Commons showed this respect for the powers of its partners in the government of the state, which gave the eighteenth-century constitution its efficiency and its stability. The truth of this statement will, as we shall now see, be apparent when we have examined the position of the House of Lords, the relations between the two Houses, the relations between Parliament and the executive government, and the position of the Courts. With the first two of these topics I shall deal in the two concluding parts of this section: with the last two I shall deal in the two succeeding sections.

The Constitution, Powers, and Constitutional Position of the House of Lords

Both Pitt and Fox recognized that the House of Lords in the eighteenth century was the "poise" or centre of the balanced English constitution; [4] and with this view Burke, and many other statesmen and political thinkers agreed.[5] It took this place because it had intimate relations with, and was in a position to influence, all parts of the government; and, at the same time, this influence exercised by the House was reinforced by the influence exercised in many different ways by individual peers. The House was both a branch of the Legislature, and the highest

[1] Parlt. Hist. xxix 414.

[2] Above 416; below 644.

[3] In the debate on Fox's libel bill in 1791 Erskine said that "he considered the jury as the commons' house of the judicial system—the balance for the people against prerogatives which it was necessary to trust with the crown and its magistrates, but which would often when unbalanced degenerate into oppression," Parlt. Hist. xxix 579.

[4] Above 603-604.

[5] Below 716, 723.

court of appeal. It was a council of the Crown; and, since its members generally engrossed the highest executive offices, all the cabinets of the period contained a majority of peers, so that its members individually influenced the policy of the government as cabinet counsellors. In a large measure they controlled the local government.[1] We have seen that, by their hold over the constituencies in town and country, they had a large share in determining the composition of the House of Commons.[2] Politically and socially, and to a large extent, intellectually, the peers were the leaders of the nation.

I shall deal with the position of the House of Lords in the eighteenth-century constitution under the three following heads: the constitution of the House; its powers; and its constitutional position.

(1) *Constitution.*

The House of Lords in 1688 was very largely made up of Stuart creations. In 1614 it consisted of 65 lay members: in 1687 it consisted of 154 lay members.[3] In 1704 it consisted of 161 lay members. In 1714 new creations and the addition of the sixteen representative peers from Scotland had raised its numbers to 187. In addition there were the twenty-six spiritual lords.[4] There was a slight increase during the reigns of George I, George II, and the first twenty-three years of George III's reign; but it was only slight—"taking the period as a whole, the average membership of the House (including the spiritual lords) was about 220."[5] As Mr. Turberville has said,[6] "the Chamber which rejected the India Bill (1783) was in essentials the same as that which had greeted Queen Anne's accession, inasmuch as it was an assembly of a small and exclusive aristocracy." It is hardly necessary to say that the numbers attending the debates of the House of Lords fell far short of this. Occasionally, indeed, the House ordered its members to attend, and was slow to accept excuses for non-attendance; and a big debate on an interesting question drew many peers—on the motion for the removal of Sir R. Walpole in 1741 135 peers attended. Mr. Turberville thinks that, as a rough generalization, it may be said that a big debate attracted from half to two-thirds of its membership.[7]

Though the House of Lords was mainly an hereditary House, it was being more constantly recruited by new men than the figures given above would seem to suggest. Old peerages became extinct with some regularity.

[1] Above 238-241; below 621. [2] Above 576.
[3] Turberville, The House of Lords in the Reign of William III 3.
[4] Turberville, The House of Lords in the XVIIIth Century 4.
[5] Ibid 5. [6] Ibid 415. [7] Ibid 5-6.

The direct descent in families is seldom for long unbroken. Few peerages have a long life. Of the forty-five peerages created by Queen Anne thirteen had already become extinct before the close of our period; of those created by George I. also thirteen. The extinction of hereditary titles is a remarkably regular phenomenon.[1]

The elective Scottish peers and the episcopal bench supplied a succession of new men; and the elevation of successful lawyers to the peerage supplied the House with some of its ablest members. Men like Hardwicke, Mansfield, Camden, and Eldon supplied the House with some of the best intellects of the day, and helped to give both weight and something of a judicial character to all its proceedings. One of the most fatal results of the passing of Sunderland's Peerage Bill of 1719 would have been the creation of a formidable impediment to the introduction of new blood into the House, by limiting the prerogative of the Crown to create peers.[2]

(2) *Powers.*

As compared with the House of Commons, the House of Lords was remarkable for the varied character of its powers. The powers of the House of Commons were pre-eminently legislative and financial. By virtue of its almost exclusive control over finance, it had gained the power to criticize the whole conduct of the executive government;[3] but, as a House, it formed no part of the executive government;[4] and though it had in some matters, notably in respect to its privileges, some of the characteristics of a court, those characteristics had begun to disappear in the Middle Ages, and, in the eighteenth century, had long sunk into the background.[5] On the other hand, the House of Lords had three very distinct sets of powers. It was a legislative assembly, a judicial court, and, as a council of the Crown, it could claim to be a part of the executive government.

The first two of these powers were and are important. The importance of the third of these powers, though it was diminishing,[6] still had a considerable effect upon the position of the political leaders of the House, and, through them, upon the House itself. Let us consider the powers of the House in the legislative, the judicial, and executive spheres.

(i) *The House of Lords as a branch of the Legislature.*

Except in matters of finance, the House of Lords in the eighteenth century had, both in theory and in practice, equal legislative powers with the House of Commons. Each House exercised a perfectly independent judgment on the legislative

[1] Turberville, The House of Lords in the XVIIIth Century 416.
[2] Above 65-66. [3] Above 589. [4] Above 590.
[5] Vol. ii 433-434, 441; vol. iv 182-186. [6] Above 33; below 611-614.

projects of the other, and rejected and amended freely. In 1756 Hardwicke complained of the practice of sending bills up to the Lords so late in the session that no adequate consideration could be given to them.[1] In both Houses important legislation originated. The following are a few illustrations of important bills originating in the House of Lords: Lord Hardwicke's measures for the settlement of the Highlands after the rebellion of 1745, the Septennial Act, Lord Hardwicke's Marriage Act, and an important Act promoted by Somers for the reform of the law. In some cases there was a fuller discussion in the House of Lords than in the House of Commons—the articles of the treaty with Scotland, on which the Act of Union was based, is an illustration. No doubt the attitude of the House to legislation showed, as might be expected, that it was alive to its own interests. The treason bills of William III's reign were designed to protect peers accused of treason by an improvement in the court of the Lord High Steward;[2] and it is clear that the Septennial Act strengthened their electioneering influence—the longer Parliament lasted, the more valuable was a seat in it.[3] Similarly the bishops were apt to oppose bills giving any measure of toleration to dissenters in the supposed interest of the Church.[4] But the Lords were not always reactionary or careful only of their own interests. Sometimes they took a more enlighteneed view than the Commons. The treason bills, which the Commons for some time refused to pass, because they were jealous of the existing procedural privileges which the Lords possessed, did effect a great improvement in criminal procedure; and the Commons' amendments made Lord Somers's bill for the reform of the law considerably less effective.[5] No doubt George III used his influence in the House of Lords to throw out measures which he disliked—this was particularly marked in the case of bills which were aimed at diminishing the royal influence over elections, such as the bills of 1782 disabling contractors with the government from being members of Parliament,[6] and disfranchising revenue officers.[7]

[1] Turberville, The House of Lords in the XVIIIth Century 283-284; below 626.
[2] Vol. vi 232-234. [3] Turberville, op. cit. 164; above 563.
[4] Turberville, op. cit. 424-425; in 1772 a bill for the relief of dissenters was carried in the House of Commons. North wrote to the King that members with dissenting constituents must vote for it, and that therefore it must be regarded "as one of those bills which ought to be thrown out by the House of Peers and not by the Commons," Fortescue, Papers of George III ii 335-336; cp. ibid iv 275, cited below; for other cases in which the House of Lords was used to reject bills which the House of Commons, with the fear of their constituents before their eyes, did not dare to reject, see Porritt, The Unreformed House of Commons i 274-278.
[5] Turberville, op. cit. 77; vol. xi 522-525.
[6] Turberville, op. cit. 401-403; for an earlier bill on this subject in 1780 which failed to pass the House of Lords see ibid 389-390.
[7] Ibid 403-404; see also above 59 n. 4, for another illustration; below 618 n. 2.

These were obvious party moves at a time when the King, the House of Lords, and the House of Commons were both in practice and in theory partners on equal terms in the work of legislation.[1]

Occasionally, indeed, claims were made that the House of Lords had a part to play in the work of legislation superior to that of the Commons. Hardwicke was of opinion that, in the case of bills which set out to change the law, that House, as it was advised by the judges, was more likely to be able to produce a workable measure. We shall see that he developed this thesis in his speeches on the Militia Bill of 1756, and the Habeas Corpus Amendment Bill of 1758.[2]

No doubt he stated his case too strongly. But it may be noted that Horace Walpole was of opinion that, at the end of George II's reign, "the House of Lords had acquired a great ascendant in the Legislature"; [3] and it is impossible to question the truth of Hardwicke's contention that, since a bill which sets out to reform the law needs careful draftsmanship, a bill which has had the benefit of the criticism of the judges is likely to be a more effective measure than one which is the work of amateurs. Moreover, it can hardly be denied that the House of Lords, assisted by the judges, was likely to give to them a more intelligent and a more impartial consideration.

This judicial attitude of mind was fostered by the fact that the House was accustomed to approach certain classes of bills from the judicial rather than the legislative standpoint. We have seen that, till 1857, the only way of getting a divorce was by Act of Parliament.[4] Bills for this purpose began to be frequent from William III's reign onwards. They were always first introduced into the House of Lords, where the evidence was carefully sifted. Similarly the House always treated bills of attainder as semi-judicial proceedings. This attitude of the House was clearly marked in the proceedings on Fenwick's attainder bill which was carried—but only by seven votes. It was still more clearly marked in the proceedings on Duncombe's attainder bill which was lost by one vote.[5] The latter case is, as Mr. Turberville says,[6] an illustration of the value of "a judicial chamber in preventing the use of irregular weapons of justice to the detriment of individual freedom." No doubt the House of Commons did approach these two classes of bills from

[1] Walpole, Last Journals ii 529, says that the passing of these Acts in 1782 gave "a very material wound to the influence of the Crown."

[2] Below 626; for the Habeas Corpus Bill of 1758 see vol. ix 119-121.

[3] Memoirs of the reign of George III iv 1.

[4] Vol. i 623; cp. Turberville, The House of Lords in the reign of William III 112-116; The House of Lords in the XVIIIth Century 7-8.

[5] Macaulay, Hist. of England chap. xxiii.

[6] The House of Lords in the Reign of William III 105.

a judicial standpoint. No doubt also it employed a semi-judicial procedure in the case of private bills. But we shall see that an adequate private bill procedure of a semi-judicial kind was developed earlier in the House of Lords than in the House of Commons [1]—a phenomenon which was not unconnected with the fact that the House was not only a branch of the Legislature, but also a court with an extensive jurisdiction.

(ii) *The House of Lords as a Court.*

With this aspect of the House of Lords I have dealt fully in the first volume of this History.[2] We have seen that, as a court of first instance, it had a criminal jurisdiction to try peers accused of treason or felony, and to try persons impeached by the House of Commons; and that, as a court of appeal, it had a jurisdiction to hear appeals in civil cases from the English and Irish, and, after the Act of Union, from the Scottish courts. Both in theory and in practice the whole House took part in this judicial work; and it formed a very important part of the proceedings of the House.

> The judicature of the House is constantly in evidence. . . . Special days were arranged for the transaction of the ordinary judicial business of the House, and on these days such business was taken first—commencing as early as ten or eleven in the morning—and nothing else was allowed to intervene.[3]

The whole House still exercises its criminal jurisdiction as a court of first instance. But, though it is clear that the Lords who were not lawyers were not well fitted to exercise its appellate civil jurisdiction, they did exercise it right down to the beginning of the nineteenth century; [4] and in Dr. Johnson's opinion it was their duty to do so.[5] In these circumstances it was inevitable that the House would come to some odd decisions. There is much point in Lord Sumner's query as to "what would happen, if some learned and industrious person compiled from the records and cases lodged by the parties in your Lordships' House, and the transcripts of your Lordships' opinions preserved in the Parliament Office, a selection of 'Unnoticed House of Lords Cases.'" [6] In fact we have seen there are cases in the books which bear traces of the non-legal element in the House.[7] That there are not more of these cases is due to several causes.

In the first place, it is due to the fact that the House, at

[1] Vol. xi. [2] Vol. i chap. iv.
[3] Turberville, The House of Lords in the XVIIIth Century 7.
[4] Vol. i 376-377. [5] Boswell, Life of Johnson (ed. 1811) iv 143 (1778).
[6] Palgrave, Brown & Son v. S.S. Turid [1922] A.C. at p. 413.
[7] Vol. i 376.

the end of the seventeenth and the beginning of the eighteenth centuries, objected to the reporting of its decisions.[1] Only a selection of the earlier cases has been reported; and the fact that they contain no large number of legal heresies may be partly due to the manner in which they were selected and edited by the reporters. When the regular reporting of cases in the House began in 1784, the convention was growing up that all cases should be decided by the legal members of the House. In the second place, it is due to the fact that, all through the century, great weight was usually given to the opinions of the lawyers. At the beginning of the century, it was much more usual than it has since become to consult the judges, who, together with the attorney and solicitor-general, were and still are summoned to the House of Lords by writs of assistance.[2] In 1693-1694 the Lord Keeper administered to the judges who had been negligent in their attendance the following rebuke:

> I am commanded by the House, to tell you, you have the honour to be the assistants here; and the House takes notice of your great negligence in your attendance. You have had sometimes warning given you, though not with so much solemnity as I am directed now to do it. If this fault be not amended for the future, the House will proceed with great severity against you.[3]

Towards the end of the eighteenth century, when the practice of consulting the judges was growing less frequent,[4] the convention that cases should be decided by the legal members of the House was growing stronger.[5] In the third place it is I think arguable that a tribunal composed of intelligent laymen, instructed by the judges and by its legal members, will sometimes be more capable than a tribunal of professional lawyers of brushing aside mere technicalities, and of deciding a case on broad common-sense lines.[6] It is I think for these reasons that

[1] Vol. vi 573. [2] Ibid 461-462, 464-465.

[3] Lords' Journals xv 364, cited Turberville, The House of Lords in the Reign of William III 94 n. 2.

[4] Turberville, The House of Lords in the XVIIIth Century 11.

[5] Paley justifies the position of the House of Lords as the final court of appeal on these grounds—"by constantly placing in the House of Lords some of the most eminent and experienced lawyers in the kingdom; by calling to their aid the advice of the judges, when any abstract question of law awaits their determination; by the almost implicit and undisputed deference which the uninformed part of the House find it necessary to pay to the learning of their colleagues, the appeal to the House of Lords becomes in truth an appeal to the collected wisdom of one high court of justice," Principles of Moral and Political Philosophy (2nd ed.) 524.

[6] This was the view of Dr. Johnson and Boswell; Boswell, approving Johnson's opinion that peers who decided contrary to the opinion of the judges were not open to censure, said, "I consider the peers in general as I do a jury who ought to listen with respectful attention to the sages of the law; but, if after hearing them, they have a firm opinion of their own, they are bound, as honest men, to decide accordingly. Nor is it so difficult for them to understand even law questions, as is generally thought; provided they will bestow sufficient attention upon them. This

the existence of an ultimate tribunal, composed mainly of non-lawyers, was able to produce decisions which, in the main, not only did not shock the legal conscience, but have even been generally approved.

Whatever we may think of the effect of the decisions of the House on the technical development of the law, there is no doubt at all that its judicial character helped to give all its deliberations both dignity and weight. Mr. Turberville has I think for the first time brought out this important consequence of the judicial character of the House of Lords. He says : [1]

> So large a proportion of the work of the House being judicial, the experts were necessarily invested with all the dignity and authority that the House exercised as a body. This explains the very remarkable ascendancy in the Chamber enjoyed by its greatest judicial members, particularly Somers, Hardwicke, and Mansfield, who, being rightly and properly accepted as guides on technical matters of law, acquired great weight on political questions also. The dividing line between the legal and the political could not be very rigidly drawn, and a lawyer like Hardwicke could nearly always detect, and draw forcible attention to, the legal aspect of a political problem. Hardwicke habitually thought of and addressed the House of Lords as a court, as an assembly inherently different from, and greater than, the House of Commons. He was right in doing so. The Upper House was in his day, as indeed it is to-day, different from the Lower, in that it is a law-maker by two different methods—by the process of passing bills, which it shares with the Commons, and also by the process of interpreting the laws, as the supreme law court of the land. When the latter very important function was in practice exercised by one or two members, those persons were inevitably among his Majesty's mightiest subjects. Hardwicke remodelled our equity law ; Mansfield remodelled our common law, and created our commercial law. When a judge like Mansfield was at one and the same time a power in Cabinet, law-courts, and House of Lords, there is no cause to wonder at the consternation felt or feigned by such an enemy as Junius, who saw in him a subtle subverter of the realm.

Let us remember that Bishop Warburton, speaking from his own observation, said that "the authority of Mansfield's judgment was so high, that in regular times the House was usually decided by it." [2]

(iii) *The House of Lords as a Council of the Crown.*

The House of Lords was not only one of the Houses of Parliament, it was also the Great Council of the Crown. It is true that this aspect of the House was almost obsolete in the eighteenth century. The last occasion on which such a council had

observation was made by my honoured relation, the late Lord Cathcart, who had spent his life in camps and courts ; yet assured me he could form a clear opinion upon most of the cases that came before the House of Lords, as 'they were so well enucleated in the cases,'" Life of Johnson (7th ed.) iv 140.

[1] The House of Lords in the XVIIIth Century 9-10.

[2] Seward, Anecdotes ii 383.

been summoned was in 1640, on the eve of the calling of the Long Parliament; and its summons was even then an instance of that recurrence to mediæval precedents, which is characteristic of the seventeenth-century constitutional expedients, and of the legal reasoning by which they were justified. But though this aspect of the House was falling into desuetude, it had left its traces in the theory, which was by no means obsolete, that the peers were the hereditary councillors of the Crown. As such they took charge of the Government when James II fled the country; and all through the century they asserted their claim to this position. In the debate on the address in 1740 it was asserted by the duke of Argyle [1] and by Lord Carteret.[2] In 1770 Chatham told the House of Lords that, "as they were the hereditary councillors of the Crown, it was particularly their duty, at a crisis of such importance and danger, to lay before their sovereign the true state and condition of his subjects . . . and the true causes of this unhappy state of affairs"; [3] and in 1778 Lord Abingdon again emphasized their claim to take this position.[4] In 1783 Temple justified the measures which he, in concert with the King, had taken to secure the rejection of Fox's India Bill in the House of Lords,[5] by the plea that, because the peers were the hereditary councillors of the Crown, the King could ask, and a peer could give, advice to the Crown.[6] The validity of this justification was naturally asserted by the supporters of the King and Pitt,[7] and as naturally denied by the supporters of Fox and North.[8] But in fact the development of the cabinet was rendering obsolete this function of the House, and still more the claim of an individual peer to tender advice to the Crown.[9] Lord North truly stated the consequences which had followed from the development of the cabinet, when he said that "he would not say that a peer or a privy councillor had not a right to advise the Crown; but he would contend, that the moment he gave such advice, he ought to take the seals and become a minister, that advice and responsibility might go hand in hand." [10]

[1] Parlt. Hist. xi 669, 677.

[2] He said, ibid 683, "we sit here in three capacities—as a legislative council, as a jurisdictive council, and as a great council of state. In this last capacity we ought to give our advice to our sovereign upon all important occasions."

[3] Ibid xvi 648.

[4] Turberville, The House of Lords in the XVIIIth Century 379.

[5] Above 111-112.

[6] Turberville, The House of Lords in the XVIIIth Century 412.

[7] Parlt. Hist. xxiv 200, 201.

[8] Ibid 197-198, 216, 218.

[9] As early as 1766 Northington had protested against taking the advice of Pitt on the American difficulties, Fortescue, Papers of George III i 219.

[10] Parlt. Hist. xxiv 290-291; this was substantially the rule laid down by Lord Grey in 1831, which is now the accepted constitutional doctrine, see Anson, The Crown (4th ed.) ii Pt. i 140.

In fact, during this century, the claim of the peers to be councillors of the Crown was given effect to by their predominance in cabinet offices.[1] To obtain cabinet rank it was generally necessary to be a peer, or to be closely connected by blood or marriage with a noble family. In the broad-bottomed ministry of 1774 there was a cabinet of thirteen, of whom eight were dukes.[2] It was only men of very exceptional abilities—men such as Walpole and William Pitt—who could attain cabinet rank without these qualifications. Walpole rose through his own exceptional ability, and the power which that ability gave him in the House of Commons. He used the Whig magnates and ruled through them.[3] The elder Pitt relied mainly for his power on popular approval, so that it might be contended that his advent to power was the first breach in the Whig oligarchy.[4] But oligarchy and the ideas which underlay it still had many years of life before it. Let us remember that in Rockingham's administration even Burke, to whom that administration owes its historical reputation,[5] never held more than a subordinate office—" the Irishman might be a genius, but he was not one of themselves, a member of one of the great families, a peer or the relative of a peer." [6] It is true that, even in these democratic days, distinguished descent and noble connections confer advantages. The son, or even the grandson, of a great statesman or a distinguished peer, starts political life with many advantages over a man of equal or even greater abilities and undistinguished descent. And it is probably good for the state that this should be so ; for to the advantage of ability is added the advantage of education in an environment which, by reason of its contact with affairs, can convey, almost insensibly, an education in the art of their practical conduct. But these impalpable modern advantages are a pale reflection of the real and tangible

[1] Turberville, op. cit. 161, 189, 256 ; Mr. Turberville, ibid 483, attaches some weight to the fact that the members of the cabinet are referred to as *Lords* of the Cabinet Council ; but this may only be a reminiscence of the phrase " Lords of the Council " which was used of the Tudor Privy Council, very many of the members of which were commoners.

[2] Turberville, The House of Lords in the XVIIIth Century 256.

[3] Horace Walpole, Memoirs of the Last Ten Years of George II i 202, says, " Sir Robert Walpole raised himself to the head of the administration, without interest, without fortune, without alliances and in defiance of the chiefs of his own party : he rose by the House of Commons—he fell by it."

[4] Above 84, 87.

[5] " Had it not been for their association with the effulgent ideas and the broad sweep of Burke's political philosophy, the Rockinghams might figure in history simply as a set of uninspiring politicians who believed very rigidly in the divine right of government by the Whig aristocracy," Turberville, The House of Lords in the XVIIIth Century 322-323.

[6] Ibid 323 ; but cp. Namier, Structure of Politics i 14-15 ; I rather doubt Mr. Namier's view that, if Burke was looked down on by his associates, this was due not so much to any contempt felt for his origin, as to the admiration which he had for theirs.

advantages, which a connection with the peerage gave in the days when the peers were the ruling class, and, as such, a very exclusive caste.[1]

This, it is true, is an influence exercised by individual peers rather than by the Lords as a House. But the fact that the House numbered among its members many ministers, who were of the inner or outer circle of the cabinet, gave it an obvious advantage. In the first place, because it enabled the peers to get first-hand information as to all affairs of state, it enabled the House to apply an informed criticism to the acts and policy of the government. In the second place, it fitted the House to take that position of mediators between the Crown and the Commons, and the Commons and the people, which was, as we shall now see, assigned to it by the leading political thinkers of this period—by Bolingbroke, by Walpole, by Blackstone, by Chatham, and by Shelburne.

(3) *Constitutional position.*

The fact that the House of Lords possessed these legislative, judicial, and executive powers, and could therefore influence all these different aspects of the state's activities, helps to explain its constitutional position of mediators between the Crown and the Commons and the Commons and the people. But it does not wholly explain it. That position owed something to the social position of the peerage, and to the political, social, and intellectual achievements of some of its members. It is necessary therefore to say something, first of the constitutional position of the House of Lords as a House, and, secondly, of the effect upon that position of the activities and achievements of some of its members.

(i) *The constitutional position of the House of Lords as a House.*

Montesquieu says :[2]

There are always in a state persons distinguished by birth, riches, or honours : but if they were confounded with the masses, and if they had merely a voice with the rest, the general liberty would mean their servitude, and they would have no interest in defending it, because the majority of resolutions would be contrary to their interests. The part assigned to them in the Legislature ought to be in proportion to the other

[1] Below 622.

[2] De L'Esprit des Lois, Bk. xi chap. vi : " Il y a toujours dans un état des gens distingués par la naissance, les richesses ou les honneurs : mais, s'ils étaient confondus parmi le peuple, et s'ils n'y avaient qu'une voix comme les autres, la liberté commune serait leur esclavage, et ils n'auraient aucun intérêt à la défendre, parce que la plupart des résolutions seraient contre eux. La part qu'ils ont à la législation doit donc être proportionée aux autres avantages qu'ils ont dans l'état ; ce qui arrivera s'ils forment un corps qui ait droit d'arrêter les entreprises du peuple, comme le peuple a droit d'arrêter les leurs."

advantages which they have in the state: that object is secured if they form a body which can stop popular proposals, just as the people can stop theirs.

Burke agreed. He held that property must be represented if it is to be adequately protected. This protection it got in a House of Lords "composed of hereditary property and hereditary distinction, and made therefore a third of the Legislature." That House so composed was, at the lowest estimate, "the ballast in the vessel of the commonwealth." [1] Blackstone epigrammatically summed up the situation when he said that "in the Legislature, the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved; while the King is a check upon both, which preserves the executive power from encroachments," [2] In fact, I think that it would be true to say that all the leading statesmen and thinkers agreed that the House of Lords was useful as a check—a check upon the people in the interests of the King, and upon the House of Commons in the interests of King and people.[3]

Bolingbroke represents the House of Lords as "opposing the excesses of the Commons," and as mediating between the other two branches of the Legislature; [4] and Burke agreed with him.[5] Walpole, in a paper which he wrote on Sunderland's Peerage Bill, maintained that the House of Lords acted as a check upon the people in the interests of the King. He said: [6]

There is no more certain maxim in politics than that a monarchy must subsist either by an army or by a nobility; the first makes it despotic, and the latter a free government. I presume none of those noble personages themselves, who have the honour to make up that

[1] French Revolution 74-76. [2] Comm. i 155.

[3] In 1780 Lord Hillsborough told the House of Lords that "it was their duty, when the prerogative of the Crown was extended to improper bounds, to connect themselves with the people; and again, when the people . . . were bent on reforming and amending the constitution on erroneous principles . . . it was their duty to check and resist . . . that rage and tempest of liberty, and bring them back to coolness and sobriety," Parlt. Hist. xxi 416-417; and see ibid xxiv 507 for a similar statement by the duke of Richmond; cp. Paley, Principles of Moral and Political Philosophy (2nd ed.) 480-482.

[4] Dissertation on Parties, cited Turberville, House of Lords in the XVIIIth Century, 32; cp. Horace Walpole, Last Journals ii 372: "What makes our constitution preferable to any other is its being constituted of three powers, King, Lords, and Commons. The wisest way would be if the two others would always join against the third, that should be most predominant, to keep the balance even."

[5] Observations on the Conduct of the Minority, Works (Bohn's ed.) iii 500, "They know that the House of Lords is supported only by its connexions with the Crown and with the House of Commons; and that without this double connexion the Lords could not exist a single year. They know that all these parts of our constitution, whilst they are balanced as opposing interests, are also connected as friends; otherwise nothing but confusion could be the result of such a complex constitution."

[6] Thoughts of a Member of the Lower House in relation to the Project for Restraining and Limiting the Power of the Crown in the future Creation of Peers (1719) 9, cited The House of Lords in the Reign of William III 238.

illustrious body, do believe they are so distinguished and advanced above their fellow subjects for their own sakes. They know well they are intended the guardians as well as ornaments of the monarchy, an essential prerogative of which it must be to add to, and augment their number in such proportions as to render them a proper balance against the democratic part of our constitution, without being formidable to the monarchy itself, the support of which is the reason of their institution.

Other writers represented the House of Lords as a check upon the House of Commons in the interests of the people. When, at the end of William III's reign, the House of Commons had committed the Kentish petitioners to prison, "the Legion's Humble Address to the Lords," congratulated the Lords because they, "like the true posterity of those noble ancestors, at the price of whose blood we receive our privileges," had "vigorously and gloriously withstood the treacherous and unfaithful proceedings of our degenerated representatives."[1] Chatham in 1770 told the House that

the privileges of the House of Peers . . . stood in fact on the broad bottom of the people. They were no longer in the condition of the barons, their ancestors, who had separate interests and separate strength to support them. The rights of the greatest and of the meanest subjects now stood on the same foundation: the security of law common to all. It was therefore their highest interest as well as their duty to watch over and guard the people; for when the people had lost their rights, those of the peerage would soon become insignificant.[2]

Shelburne in 1778 deliberately appealed from a servile House of Commons to the Peers. He said:

I shall never submit to the doctrines I have heard this day from the woolsack, that the other house are the only representatives and guardians of the people's rights. I boldly maintain the contrary. I say this House are equally the representatives of the people. They hold the balance; and if they should perceive two of the branches of the Legislature unite in oppressing and enslaving the people, it is their duty to interpose to prevent it.[3]

The House of Lords was well fitted thus to hold the balance of the constitution. We have seen that in this century the members both of the House of Lords and the House of Commons formed a small and exclusive aristocratic society.[4] The hereditary character and the close relationships of the members of the House of Lords made them the inner circle of this society. This added immensely both to the dignity and the strength of the House. It gave it a corporate character and it created a corporate sense in its members. It made it, as Mr. Turberville has said "an organism."[5] The development of this corporate

[1] Cited by Turberville, The House of Lords in the Reign of William III 244.
[2] Parlt. Hist. xvi 651. [3] Ibid xix 1048. [4] Above 56-57.
[5] The House of Lords in the Reign of William III 232.

character and corporate sense was helped by its position as a council of the Crown, and by the privileges of the House and of the individual peers. We have seen that its position as a council of the Crown helped its members to retain their hold over very many of the important offices of the executive government.[1] The possession of these offices and the possession of many privileges, both by the House and by its members,[2] constantly reminded the peers that they were a class apart from the rest of the nation; and the controversies in Anne's reign with the House of Commons on questions of privilege,[3] obviously tended to unite them in defence of their rights. It was for these reasons that the House was able to hold the balance of the constitution and, by so doing, to give continuity and stability to national policy throughout the eighteenth century.

On the other hand, some of the results of the development of the corporate character of the House were a cause of weakness. If the corporate character of the House helped to give continuity and stability to national policy, it also to some extent unfitted it to take long views, and to deal with new situations. It made the House more fitted to deal with a static situation than with changing conditions. Equally with the House of Commons it failed to solve the American problem and the Irish problem; and it showed no comprehension of the great changes both in public and private law which the industrial revolution was beginning to demand. Similarly the possession by its members of many lucrative offices, though it added to the dignity and weight of the House, and tended to emphasize its character as a council of the Crown, left it very susceptible to royal influence. At the same time, the close family connections of its members produced a tendency to split into rival groups, which were divided from one another by no clear principle except family rivalry. These weaknesses put a useful weapon into the hands of the Crown whenever it wished to make its influence felt.[4] Moreover, there was necessarily a certain amount of common interest between the House of Lords and the Crown [5]—"the nobility," as Horace Walpole said, "are by principle more devoted to the Crown"; [6] and "when they do not fear the Crown they will always be ready to uphold it." [7]

[1] Above 613. [2] Above 545. [3] Vol. vi 271-272.
[4] Hervey, Memoirs i 233, cited above 59 n. 4; above 607.
[5] Turberville, The House of Lords in the Reign of William III 240.
[6] Memoirs of George III iv 207.
[7] Memoirs of George II ii 296; as Paley said, "an attachment to the monarchy from which they derive their own distinction; the allurements of a court, with the habits and with the sentiments of which they have been brought up; their hatred of equality and of all levelling pretensions, which may ultimately affect the privileges, or even the existence of their order . . . will determine their choice to the side and support of the Crown," Principles of Moral and Political Philosophy (2nd ed.) 481.

Blackstone justified the exclusive powers of the House of Commons over money bills on this ground. The reason for these powers, he said, is not the fact that supplies " are raised upon the body of the people." A large part of the property taxed belongs to the Lords; and " therefore the Commons not being the *sole* persons taxed, this cannot be the reason of their having the *sole* right of raising and modelling the supply." The real reason is to be found in the fact that

> the Lords being a permanent hereditary body, created at pleasure by the king, are supposed [to be] more liable to be influenced by the Crown . . . than the Commons who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous to give the Lords any power of framing new taxes for the subject; it is sufficient that they have a power of rejecting, if they think the Commons too lavish or improvident in their grants.[1]

Naturally George III made full use of his power, to influence the House of Lords.[2] Peers who opposed him were deprived of their offices, and peers who supported him were rewarded by a step in the peerage, by offices, and by pensions. Amongst the King's election expenses was " the list paid by Mr. Robinson to Peers." [3] How effective was this means of increasing the royal influence of which George III had made constant use since the beginning of his reign, the rejection of Fox's India Bill shows.[4]

This susceptibility to royal influence was weakening the position of the House of Lords in the latter half of the century, because it tended to emphasize its non-representative character. It is true that the rejection by the House of Lords of Fox's India Bill, which was approved by the nation, showed that the Lords were still able successfully to mediate between King and the House of Commons, and were in truth the " poise " or balance of the constitution. That action and its effects shew that it was not only in its constitution, but also in its powers, that in 1783 the House of Lords was " the same as that which greeted Queen Anne's succession." [5] But it was the last time that the House took this position in the constitution. As early as the second quarter of the eighteenth century, Voltaire had noted the increasing power of the House of Commons.[6] It is true

[1] Comm. i 169.

[2] See Horace Walpole's account, Last Journals i 38, of the way in which the Royal Marriage Act was got through the House of Lords in 1772: " The King grew dictatorial and all his creatures kissed the earth. It was given out that he would take a dissent on this bill as a personal affront—adieu! qualms, fears, and care of posterity. Zeal and money, and influence of all sorts went to work, and the consequence was a division against Lord Rockingham's questions of 90 to 32. Lord Carlisle voted against the individual question that he had voted for two days before."

[3] Fortescue, Papers of George III v 473. [4] Above 111-112; below n. 5.

[5] Turberville, The House of Lords in the XVIIIth Century 415.

[6] Lettres Philosophiques (ed. Lanson) i 105.

that right down to 1832 the influence of the Crown and of individual peers was great;[1] but in 1742 Hume said of the House of Lords that it was a powerful support to the Crown so long as the Crown supported it, "but both experience and reason show that they have no force or authority sufficient to maintain themselves alone, without such support";[2] and in 1766 Lord Chesterfield, speaking of Pitt's acceptance of a peerage, had, with some exaggeration, called the House "that Hospital of Incurables."[3] As a House Burke said of it in 1793 that it was "the feeblest part of the constitution."[4] In fact, even before 1783, the influence of the nation as a whole, exercised both inside and outside the House of Commons, was making its voice heard.[5] George III defeated the Fox-North coalition partly because he had the nation behind him.[6] The social and economic changes which marked the closing years of the eighteenth century, changes which were emphasized by the social and economic policy of Pitt, tended to give greater weight to the House of Commons.[7] These changes portended a considerable alteration in the constitutional position of the House of Lords, and, consequently, in the position which the peers occupied in English society in this century.

(ii) *The effects of the activities and achievements of individual peers.*

There is no doubt that the influence of the House as a House was added to by the achievements of many of its members. It was added to (*a*) directly by their political influence, and (*b*) indirectly by their social position and intellectual achievements.

(*a*) We have seen that the electoral influence of many of the peers was considerable. In the counties they possessed this influence by virtue of their position as landowners.[8] In some of the boroughs they were able in effect to nominate the members,[9]

[1] See Rosebery, Pitt 237, for an illustration of the way in which in 1803 the influence of the Crown enabled Addington to defeat a motion of Pitt.

[2] Essays (ed. 1875) i 120.

[3] Letters to his Son ii 504; Lord Chesterfield was simply repeating some of the popular sayings of the time, which, in the manner of popular sayings, contained a good deal of exaggeration—in 1740 it had been said, "this House hath been called a Hospital for retiring ministers, or a Sanctuary for guilty ones," Parlt. Hist. xi 452, note from the Secker MS.; in 1784 Burke repeated Lord Chesterfield's description, and said that the House "might also be very properly called a political workhouse, as etymologists say *lucus a non lucendo*, like a parish workhouse, where people are sent to when they are no longer able to work," Parlt. Hist. xxiv 348.

[4] Observation on the Conduct of the Minority, Works (Bohn's ed.) iii 500; note also that in 1782 George III said that "the House of Commons is the scene for a man to exercise his Tallents, and to acquire that facility which the Superior House can never give occasion to," Fortescue, Papers of George III vi 200.

[5] Above 87, 101-102. [6] Above 110. [7] Above 120-122; below 628.

[8] Above 557. [9] Above 564, 576.

and in others they could exercise a decisive influence over the elections.[1] This electoral influence was increased by some of the legislation of the century. The Septennial Act (1716) helped it by making a seat more valuable on account of the longer duration of Parliament.[2] The Act of 1729, which provided that the last determination of the House of Commons on the franchise should be final, stereotyped the existing system, and gave a Parliamentary title to many borough owners.[3] The Grenville Act (1770), which transferred the right of determining contested elections to a select committee,[4] was thought by Horace Walpole to have increased the influence of the peers.[5] It was very largely due to this electoral influence that the House of Lords maintained its position, throughout the greater part of this century, as the holder of the balance between King and people. Though, after the Revolution, it was thought by some that the House of Lords was of small account as compared with the House of Commons,[6] the events of the eighteenth century showed that that opinion was erroneous. The Lords, as Horace Walpole said in George II's reign, had become "more considerable than they had been before the Revolution."[7]

The territorial possessions of the peers, which gave them their electoral influence, gave them also a large measure of control over the local government of the country. Peers did not as a rule take a large part in the actual conduct of the local government. It was the smaller landowners who, as justices of the peace, did the daily work of governing the country in petty and quarter sessions.[8] But since the control over the appointments to the office of justice of the peace had in effect passed to the lord lieutenants,[9] and since this post was very often held by a peer, peers had a substantial control over the personnel of those who did the work of local government in the counties. Matters were different in the large municipal corporations which had their own commissions of the peace. Peers could not there exercise the direct control which they exercised over the appointments to the county bench. But in the smaller boroughs, which had developed out of the manor, and had never got complete independence of their lords, the control of these lords was often very real.[10] It is true that, as the eighteenth century

[1] Above 576. [2] 1 George I St. 2 c. 38; above 563.
[3] 2 George II c. 24 § 4; above 563. [4] 10 George III c. 16.
[5] Last Journals i 331; cp. Turberville, The House of Lords in the XVIIIth Century, 463-464.
[6] Turberville, The House of Lords in the Reign of William III 228-230.
[7] Memoirs of George II's reign ii 295; "I have seen," he wrote in 1769, "the House of Lords striding to aristocracy at the end of the last reign," Letters (ed. Toynbee) vii 345. [8] Above 241. [9] Vol. i 291; above 238.
[10] For a general description of these boroughs see Webb, The Manor and the Borough 200-211; vol. i 140, 141-142; above 141-142.

proceeded, these smaller boroughs became, as the Webbs have said, more autonomous.[1] But that did not mean that the influence of the great landowners, who had once been their lords, disappeared. What Burke said of the prerogative of the Crown we may say of the power of the lords of these boroughs: "The power of the Crown almost dead and rotten as Prerogative, has grown up anew under the name of Influence." [2]

The peers, then, did not take an active part in local government; but they did exercise a great indirect influence over the persons by whom it was administered both in the county at large and in some of the smaller boroughs; and this influence helped to consolidate their great electoral influence both in the borough and the county elections. Obviously this influence, which many of the peers had over the local government of the county, helped to strengthen the position of the House of Lords as a House.

> A lord who scarcely ever appeared at Westminster . . . was able to exert the widest authority as a territorial magnate. This territorial power reacted upon the influence of the House of Lords. . . . The House was in the main an assembly of great landowners . . . and because of their authority in their respective districts able to wield a great authority in Parliament.[3]

(*b*) This political influence exercised by particular peers was increased by the intellectual and social influence of very many of them.[4]

No doubt a very strong case can be made against many peers. It is only to be expected that, amongst an hereditary order, there should be black sheep; and it is only to be expected that dramatists should unduly emphasize their importance—they made better dramatic copy. There will always be peers, as there will always be commoners, who will more or less answer to the description of Lord Foppington,[5] Lord Rake,[6] Lord Plausible,[7] and Lord Froth.[8] There were peers of these types all through the century. Moreover, it is clear that both gambling and drunkenness were very prevalent vices. "Notoriously the prince of gamesters was Charles Fox; his companions at the tables were mostly either peers or, like himself, the sons of peers." [9] Port was the undoing of many; "and the man of fashion, plagued by the

[1] Op. cit. 204.
[2] Thoughts on the Cause of the Present Discontents, Works (Bohn's ed.) i 313.
[3] Turberville, The House of Lords in the Reign of William III 232.
[4] Ibid chap. iii; The House of Lords in the XVIIIth Century chap. xvi.
[5] Vanbrugh's *Relapse*. [6] Vanbrugh's *Provoked Wife*.
[7] Wycherley, *The Plain Dealer*. [8] Congreve's *Double Dealer*.
[9] Turberville, The House of Lords in the XVIIIth Century 434; cp. Walpole, Last Journals ii 225-227, for Lord Foley's career, and the way in which an attempt was made, which nearly succeeded, to extricate him from his difficulties by a private Act which, in effect, set aside his father's will.

gout and unable to tear himself away from the tables at his club till the early hours of the morning, was apt to be middle-aged at thirty and old at forty." [1] But, in fairness to the peerage, it must be remembered, first, that we hear most of these prominent backsliders; secondly, that some allowances must be made for the contemporary code of manners; and, thirdly, that some of these peers who indulged in dissipation showed that they could be useful and even brilliant public servants. Bolingbroke and Carteret were hard drinkers; the great duke of Marlborough had been famous for his gallantries; and Thurlow's family life was notorious.

No doubt it can be truly alleged against the peerage that, as a class, they were often inordinately proud of belonging to an exclusive caste. There was much consternation when Lady Caroline Lennox, the daughter of the duke of Richmond, eloped with Henry Fox, whose family had not yet been raised to the peerage.[2]

> His Grace's fury knew no bounds . . . the family hurried to the country; and the Duke and Duchess vowed eternal resentment. London society was in a ferment. "If his Majesty's Princess Caroline had been stolen, there could not have been much more noise." Newcastle treated the matter as an affair of state. "I thought our fleet or our army were beat, or Mons betrayed into the hands of the French," said Carteret, on hearing the explanation from the lips of his brother Secretary of "this most unfortunate affair." [3]

As Mr. Turberville has pointed out, the view inculcated by Lord Chesterfield, in his *Letters to his Son*, "that the ultimate sin was vulgarity, the chief of virtues good breeding, was based upon a fundamental class consciousness." [4] As for the vulgar herd, Lord Chesterfield thought that they "can hardly be said to think; their notions are almost all adoptive; and in general it is better that it should be so; as such common prejudices contribute more to order and quiet, than their own separate reasonings would do, uncultivated and unimproved as they are." The Protestant conviction that the pope is anti-christ is more efficacious than the reasoning of Chillingworth, the tale of the pretender's having been introduced into the Queen's bed in a warming pan is more prejudicial to the Jacobite cause than the reasonings of Locke, "and the silly notion that one Englishman can beat three Frenchmen has sometimes enabled one Englishman in reality to beat two." [5] No doubt, this pride of birth and this exclusiveness were sometimes carried to absurd lengths. But it

[1] Turberville, The House of Lords in the XVIIIth Century 435.
[2] Ibid 406. [3] Ilchester, Life of Henry Fox i 107-108.
[4] The House of Lords in the XVIIIth Century 444.
[5] Chesterfield's Letters i 395-396.

must be admitted that the peers as a whole had some cause for pride in their order. They were in fact the best educated class in the nation. Most of them had been submitted to the hard discipline of the public schools of those days; and the minds of many of them had been enlarged by foreign travel. The ideal of good breeding which Lord Chesterfield taught his son may have been morally low; but it was not intellectually low, nor was it narrow. The training which he gave his son, in order to enable him to shine in the world as a man of good breeding, included the study of languages, the study of the history and the literature both of England and of the continent, and a social training in the courts and great houses of many European countries. Good breeding, thus largely conceived, he regarded as a prophylactic against the pursuit of vice as practised coarsely by the unreflecting common herd; for he subscribed very literally to the view expressed by Burke in a famous passage in his *French Revolution* that "vice lost half its evil by losing all its grossness." [1]

Many peers, if they did not excel, at least attempted to shine in many spheres—in literature, in science, in their patronage of architecture and of the arts. Amongst the noble authors are George Savile, marquis of Halifax, John Sheffield, earl of Mulgrave, Chesterfield, Hervey, Lyttelton, and above all Horace Walpole, to whom the historians of many sides of life in the eighteenth century owe so much. Amongst peers who were sympathetic to new legal and political ideas, which were coming to the fore at the end of the century, was Shelburne—the patron of Priestley, Bentham, Romilly, and Horne Tooke, and the friend of Franklin.[2] Amongst the peers who were remarkable for their scientific attainments are Halifax, the pupil and friend of Newton, the second duke of Portland, and the third duke of Bridgewater who, with his engineer Brindley, did pioneer work in the building of canals. It was the great country houses of the peers which gave to such architects as Vanbrugh and Adams their opportunity; and their owners adorned their walls with the masterpieces of Romney, Reynolds, and Gainsborough. Nor

[1] "The pleasures of low life are all of this mistaken, merely sensual, and disgraceful nature; whereas those of high life, and in good company (though possibly in themselves not more moral) are more delicate, more refined, less dangerous, and less disgraceful; and, in the common course of things, not reckoned disgraceful at all," Letters ii 12; "Let them show me a cottage, where there are not the same vices of which they accuse courts; with this difference only, that in a cottage they appear in their native deformity, and that in courts, manners and good breeding make them less shocking, and blunt their edge," ibid ii 159; with this view Dr. Johnson agreed; he said, "high people are the best; take a hundred ladies of quality, you'll find them better wives, better mothers, more willing to sacrifice their own pleasure to their children than a hundred other women. . . . Farmers cheat and are not ashamed of it: they have all the sensual vices too of the nobility with cheating into the bargain," Boswell, Life of Johnson (7th ed.) iv 147-148.

[2] Halévy, Philosophic Radicalism 146; above 117-118.

must we forget the services rendered to what was then the staple industry of the country—agriculture.

Two of the greatest agricultural reformers of the century are "Turnip" Townshend and Coke of Holkham who became Earl of Leicester. The latter fertilized his lands in Norfolk in such wonderful fashion as to transform soil which had never before produced anything but inferior rye into a great wheat-producing soil, and so improved his live stock and house property that the rental of his estate, which was only a little more than £2,000 when he took it over in 1776, had become £20,000 in 1816. Rockingham and Grafton were other great improving landlords; and so also was the fifth Duke of Bedford. Possessing the capital which was essential for experiment and development, the aristocratic landlords were among the pioneers in the agricultural revolution of the century.[1]

And it must be added that, if they had not effected this revolution, it would have been impossible to feed the greatly increased population which the industrial revolution brought into being; nor would it have been possible for the country to have stood the long strain of the Napoleonic wars. Buckle is probably right when he says that, "until the reign of George III the House of Lords was decidedly superior to the House of Commons in the liberality and general accomplishments of its members."[2]

In these ways the great houses of the nobility gave a brilliance to eighteenth-century society, which contrasts with the more sombre and the more uniform tones of the society of the next age. And this brilliance was enhanced by the fact that it rested not merely on the intellectual, the artistic, and the social gifts of the aristocracy, but upon a solid basis of political achievement. Unlike the French nobility, they were not merely the leaders of a brilliant society. As Mr. Turberville has rightly said, the English nobility "were great because they served"; [3] and with this view Bagehot agrees.[4] As we have seen, peers were the servants of the government in many spheres —in local government, in home affairs, in foreign affairs, in the army, the navy, and the diplomatic service. Thus they gave to the country a succession of men with an inherited instinct for government. With some justice they could be regarded by Burke as the permanent ballast of the constitution, continuing from age to age the great traditions of culture and statesmanship. In a letter which he wrote to the duke of Richmond in 1772[5] he said of the nobility:

[1] Turberville, The House of Lords in the XVIIIth Century 450.

[2] History of Civilization (ed. 1869) i 451-453, cited by Turberville, The History of the House of Lords in the Reign of William III 233.

[3] The House of Lords in the Reign of William III 60.

[4] Literary Studies i 241, cited above 334 n. 4.

[5] Correspondence i 281-282, cited Turberville, The House of Lords in the XVIIIth Century 485.

You people of great families and hereditary trusts and fortunes are not like such as I am, who, whatever we may be by the rapidity of our growth, . . . yet still we are but annual plants that perish with the season, and leave no sort of trace behind us. You, if you are what you ought to be, are in my eye the great oaks that shade a country, and perpetuate your benefits from generation to generation. The immediate power of a Duke of Richmond, or a Marquis of Rockingham, is not so much of moment; but if their conduct and example hand down their principles to their successors, then their houses become the public repositories and office of record for the constitution.

Burke's words embody the eighteenth-century point of view. But, when he was writing, the changes which were diminishing the constitutional importance of the House of Lords, were also diminishing the social and intellectual importance of individual peers. But these changes were still in the future at the beginning of the war with the French Republic. We must now examine very briefly the relations which existed between the House of Commons and the House of Lords before these changes began to operate.

The Relations between the House of Commons and the House of Lords

In Anne's reign, when the House of Lords was predominantly Whig and the House of Commons was sometimes predominantly Tory, there were often serious disagreements between the two Houses.[1] In 1703 a resolution of the House of Lords exculpating Halifax, against whom the commissioners of public accounts had made charges, produced a serious disagreement.[2] In the same year the House of Commons complained of the manner in which the House of Lords had investigated the charges of corresponding with Jacobites, made against the marquis of Atholl, and the counter-charges made against the duke of Queensbury.[3] In 1702-1704 there were disputes as to the Commons' bills against occasional conformity;[4] and the same period was marked by the quarrel over privilege which arose out of the case of *Ashby v. White*.[5] But these disputes died down when the long Whig ascendancy began with the accession of the Hanoverian dynasty.[6] The Jacobite faction became gradually more and more inconsiderable; all parties accepted the principles of the Revolution; and the political contests under George I and George II were, for the most part, contests

[1] Above 47.
[2] Parlt. Hist. vi 130-143; Turberville, The House of Lords in the XVIIIth Century 42-45.
[3] Parlt. Hist. vi 178-224; Turberville, op. cit. 46-50.
[4] Above 47; Turberville op. cit. 50-58.
[5] Vol. vi 271-272; above 543.
[6] Above 55-57; Turberville, op. cit. 479-480.

between different factions of the Whig party.[1] It was not till George III's reign that the King's policy raised a new Tory party of King's friends, and revived in a new form the old contest between Whigs and Tories.[2]

The result was that during the eighteenth century the relations between the two Houses were harmonious. The quarrels which occurred were occasional, and on trivial grounds. For instance in 1770 the dignity of the House of Commons was offended by the expulsion, along with other strangers, of four members of the House of Commons who were in charge of a bill;[3] and for some time the members of each House were excluded from the other, till the inconvenience of this practice brought the Houses to their senses.[4] Occasionally, too, we hear a complaint that bills were sent up to the Lords so late that they could not give them proper consideration.[5] But these were exceptional incidents. Generally each House recognized the powers and privileges of the other, and neither House showed any disposition to encroach upon the domain of the other. Though the power of the House of Commons was greater than that of the House of Lords, though it was clearly the more active and influential House of the two, it never denied that the House of Lords had a distinct part to play in the constitution, and it never questioned the right of that House to use the powers needed to enable it to play that part.[6]

It was upon the House of Commons that the main work of finance and legislation fell. The House of Lords assisted the House of Commons to perform these functions; but the part which it took was much less that of the active initiator, and much more that of the supervisor and the critic. It supervised and it criticized the work of the House of Commons and, like the House of Commons, it supervised and criticized the work of the executive government. Though its power to initiate legislation was, except in the case of money bills, the same as that

[1] Above 62. [2] Above 102. [3] Parlt. Hist. xvi 1317-1329.
[4] Ibid xviii 47-48, 52-53; xx 469-474.
[5] In 1756 Lord Hardwicke said, "every member of the other House takes upon him to be a legislator, and almost every new law is first drawn up and passed in the other House, so that we have little else to do, especially towards the end of the session, but to read over and consent to the new laws they have made: nay, some of them are sent up so late in the session that we have hardly time to read them over, and consider whether we shall consent or no. . . . My lords by this new method of law-making, the business of the two Houses seems to be so much altered, that I really think the writs of summons ought to be altered: those for the other House ought now to be 'ad consulendum,' and those to the members of this 'ad consentiendum,'" ibid xv 736-739; this passage does not appear in the corrected report which Lord Hardwicke published, see ibid 724 seqq.
[6] "If certain of the nobility hold the appointment of some part of the House of Commons, it serves to maintain that alliance between the two branches of the Legislature which no good citizen would wish to see dissevered," Paley, Principles of Moral and Political Philosophy (2nd ed.) 490.

of the House of Commons, and though it sometimes did initiate important legislation,[1] its members had not as a rule the special knowledge required to initiate the reforms needed in the mechanism of government local and central, in different branches of industry and commerce, and in the rules of law. Just as in the local government the peers did not, as a rule, take an active part, but, by virtue of their position as landowners, as lord lieutenants, or as privy councillors, were able to influence its conduct by the justices of the peace and borough officials;[2] so in Parliament, the House of Lords took a less active part than the House of Commons, but was able to exercise a critical influence upon the work of the House of Commons, by its power to amend or reject the bills which that House sent up to it, and by its power to express an independent view, which sometimes agreed with, and sometimes differed from, the views which the House of Commons expressed as to the conduct of the executive government.

That this was the view which was held of the relations between the two Houses during the eighteenth century can be illustrated by a statement made by Burke in 1774 with respect to the legislative work of the two Houses, and by Lord Hardwicke in 1743 with respect to their legislative work and their powers to criticize the conduct of the executive. Burke, in order to prove the inconvenience of the order excluding members of the House of Lords from the House of Commons and vice versa, which had followed upon the expulsion of certain members of the House of Commons from the House of Lords in 1770,[3] said:[4]

> He was very well convinced that upon certain occasions it was absolutely necessary that members should have free access to their respective Houses; that a great commercial bill, the importation of provisions from Ireland, would probably have been lost, if he had not had access to the House of Peers, to explain the principles upon which the bill went; and that if the doors of that House had not been shut against the Lords last session, the bill for a security of Literary Property would never have been rejected with such contempt, after it had passed the House of Commons; for if the young peers had come down and heard the arguments on it, it would have met with a different fate.

Hardwicke, in the course of a debate upon the action of the government in taking Hanoverian troops into British pay, pointed out that the House of Commons had approved this action, and that though this fact was by no means a conclusive proof of the wisdom of the government's action, it was a fact to be taken into consideration, because it was "the result of the consideration of the wise men";[5] and

[1] Above 607. [2] Above 238-241. [3] Above 626.
[4] Parlt. Hist. xviii 53. [5] Ibid xii 1165.

though we are by no means to suffer the determinations of other men to repress our enquiries, we may certainly make use of them to assist them ; we may very properly therefore enquire the reasons that induced the other House to approve those bills which are brought before them, since it is not likely that their consent was obtained without arguments, at least probable, though they are not to be by us considered as conclusive upon their authority. The chief advantage which the public receives from a Legislation formed of several distinct powers, is, that all laws must pass through many deliberations of assemblies independent of each other, of which, if the one be agitated by faction, or distracted by divisions, it may be hoped that the other will be calm and united, and of which it can hardly be feared, that they can at any time concur in measures apparently destructive to the commonwealth.[1]

The fact that the members of the two Houses were predominately of the same class made for harmony, because it produced similarity of outlook. But this by itself would not have been sufficient to produce the particular kind of partnership between the two Houses which existed in the eighteenth century. The House of Lords would hardly have acquiesced in the growth of the powers and prestige of the House of Commons, and in the relegation of itself to the position of a supervisory and critical second chamber ; the House of Commons, conscious of the growth of its powers and prestige, would not so easily have acquiesced in the exercise by the House of Lords of its unlimited powers to amend and reject their bills, if there had not been another bond of union between the two Houses. This bond of union was the control which the representative system gave to individual peers over the composition of the House of Commons,[2] Mr. Turberville says : [3]

The Lower House became more powerful, more authoritative—but it was not emancipated. Its enhanced position was maintained on certain conditions, by a composition with the House of Lords. The Peers did not object to the increased consequence and prestige of the Lower House, so long as they could retain an effective hold upon its composition. . . . It is true that there existed a certain animosity between the peers and the squirearchy, but . . . there was a fundamental community of interest between them—that of the land. So long as the country remained mainly agricultural, the influence of the great landowning peers was bound to remain a great power behind, and in, the House of Commons.

Occasionally, indeed, complaints were heard of the influence which peers used at elections to the House of Commons.[4] But they came to nothing. So many members of the House owed

[1] Parlt. Hist. xii 1165. [2] Above 564, 576.
[3] The House of Lords in the XVIIIth Century 481-482.
[4] In 1780 there was a complaint against the duke of Bolton for his interference in the Southampton election, Parlt. Hist. xx 1305-1307, and a complaint against the duke of Chandos for his interference in the same election, ibid 1315-1318.

their seats to this influence that it would have been obviously absurd to press such complaints.[1]

In fact it was the representative system which is the key to very many of the salient features of the eighteenth-century constitution, to some of its weak points and to many of its good points. We have seen that it produced at least as capable a House of Commons as any of the representative systems which have succeeded it ; [2] and that it enabled the two Houses to work together, each within its allotted sphere, to the advantage, as all eighteenth-century political thinkers rightly maintained,[3] of the whole state. We shall now see that this same representative system supplied the chief of the conventional links between Parliament and the central government, without which it would have been very difficult for the two traditionally rival and separated powers—Parliament and the Prerogative—to work together harmoniously in the government of the state.

V

Parliament and the Executive

Bagehot, writing in 1865, said that, though, according to the traditional theory of the English constitution, " the goodness of the constitution consists in the entire separation of the legislative and executive authorities " ; its efficient secret was " the close union, the nearly complete fusion " of these authorities, through the connecting link of the cabinet.[4] The cabinet, he said, " is a combining committee—a *hyphen* which joins, a *buckle* which fastens the legislative part of the state to the executive part of the state." [5] The cabinet did not hold this position in the eighteenth century. In that century there was a separation between the legislative and executive authorities ; and the efficient secret of the constitution consisted in this separation, in the separation of the two Houses between which the legislative authority was divided, and in the separation of the judicial from the legislative and the executive parts of the constitution.[6] It is obvious, however, that, if the machine of government was to work smoothly, some method of bridging the gap which separated the Legislature and the Executive must be found. Methods were found ; but the cabinet—the committee of the important ministers of the Crown which had, as we have seen, superseded the Privy Council as the governing body of the kingdom [7]—was

[1] Turberville, The House of Lords in the XVIIIth Century 455-457.
[2] Above 564-565. [3] Below 714-716. [4] The English Constitution 10-11.
[5] Ibid 14. [6] Above 417, 614-616 ; below 715-716. [7] Above 479.

only one, and not the most important of those methods. The most important of those methods was that system of influencing Parliament, which was rendered possible by the state of the representation. We have seen that there were many methods by which the Crown could influence the elections to the House of Commons,[1] that there were many methods by which it could influence the House of Lords,[2] and that there were many methods by which it could turn to its own use the electoral influence of the peers and great landowners.[3] It was this system of influence, working through the unreformed House of Commons, the House of Lords, and the peers and great landowners, which was the chief method of bridging the gap between the Legislature and the Executive during the greater part of the eighteenth century. And, since it was a method of bridging the gap which left large powers in the hands of the King, the House of Commons, and the House of Lords, it secured both a working arrangement between the three partners, and preserved for them a considerable independence in the exercise of their powers.[4]

It is true that the King could not govern by means of a cabinet which could not maintain a majority in the House of Commons. But, in the eighteenth century, the cabinet had not attained the solidarity which it gained in the nineteenth century,[5] and we have seen that the King had considerable powers of influencing the votes of many members of the House of Commons ;[6] so that the life as well as the constitution of the cabinet were determined as much by the King as by the House of Commons. Then, too, we have seen that, in the earlier part of the century, all parties deprecated any kind of formed opposition to the King's government. A particular minister, or a particular measure might be objected to, but that did not necessarily imply opposition to the government as a whole.[7] There were always a certain number of members who, from conviction or by means of influence, were prepared to support the King and his government.[8] For all these reasons it was not the cabinet, but the system of influencing Parliament, which was rendered possible by the state of the representation, which was the chief link between Parliament and the central government. It was around this system of influence, and not around the cabinet, that the conventions of the eighteenth-century constitution chiefly centred.

We have seen that conventions are necessary wherever and whenever the powers of government are vested in different persons or bodies—wherever and whenever there is a mixed

[1] Above 579-580. [2] Above 607, 618. [3] Above 577-578.
[4] Above 525-526. [5] Below 638-640. [6] Above 580.
[7] Above 33 ; below 637. [8] Above 32.

constitution [1]—for the reason given by Burke.[2] And not only will conventions spring up in these circumstances, but they will always have two common characteristics. In the first place, it is at these conventions that we must look if we would discover the manner in which the constitution works in practice. They determine the manner in which the rules of law, which they presuppose, are applied, so that they are, in fact, the motive power of the constitution. In the second place, these conventions are always directed to secure that the constitution works in practice in accordance with the prevailing constitutional theory of the time. We have seen that the conventions of the Tudor period were directed to secure the political predominance of the Crown.[3] The conventions of the eighteenth century, which centred round this system of influence, were directed to secure the maintenance of a system of divided powers and of checks and balances. The conventions of the nineteenth and twentieth centuries, which centre round the cabinet, are directed to secure the political predominance of the House of Commons.

It was because the conventions of the constitution, which centred round this system of influence, had been the chief link between Parliament and the central government all through the eighteenth century, it was because the Reform Bill of 1832 destroyed this link that the duke of Wellington asked the question, "How is the King's government to be carried on if the bill passes?" [4] The Tory party in 1832 believed, as Bagehot has said, "that if the majority of the House of Commons consisted of persons not nominated by great borough proprietors,

[1] Vol. vi 4-5.

[2] French Revolution 28, cited vol. vi 4; Dr. Ivor Jennings, The Law and the Constitution 71, has pointed out that both Mill, Representative Government 4, 87-88, and Austin, Jurisprudence i 273, have noted and explained the existence of these conventional rules, which they call maxims, or rules of practice, or rules of political morality. I think that the term "conventions of the constitution," by which they are now generally known, originated with Freeman, who in his book on the Growth of the English Constitution 114, which was published in 1872, pointed out that they formed a "conventional" code, and that the existence of this code implied "the firmest possible establishment of the power of the written law as its groundwork"; Dicey was much influenced by this book of Freeman's; he adopted Freeman's account of this code in 1885 in his Law of the Constitution, gave to these rules the name of the "conventions of the constitution," and showed that Freeman was right when he had said they rested ultimately on the law. Dicey may of course have been influenced by Mill, as Dr. Jennings suggests; but I think the main source of his inspiration was Freeman's book.

[3] Vol. vi 5.

[4] "It was believed by very many persons that the old system of representation contained a peculiar machinery for securing the strength of the executive. This theory, it has been well observed, constituted the esoteric doctrine of the Tory party. The celebrated question asked by the Duke of Wellington, 'How is the king's government to be carried on if the bill passes?' which has since received a practical answer, indicates without concealment the real view of English government entertained by him and his party," Bagehot, Essays on Parliamentary Reform 152.

but freely chosen by genuine popular election, the government could not be carried on." [1]

But this view was even then becoming antiquated. The rise of a formed opposition during the course of the American war of independence,[2] and later the emergence of distinct lines of cleavage between the Tories and the new Whigs,[3] were giving a new solidarity to the cabinet, and a new position to its head—the Prime Minister.[4] The result was that, even before 1832, the management of Parliament by the methods rendered possible by the state of the representation in the unreformed House of Commons, was becoming a weaker link between Parliament and the central government than it had been during the first three-quarters of the eighteenth century. It was becoming clear that the composition of the cabinet was tending to be determined by the strength of the rival parties in the House of Commons, and that the importance of the Crown in determining the relative strength of these parties was weakening. In other words the cabinet was beginning to assume its modern rôle as the link between Parliament and the central government, and the modern conventions of the constitution, which centre round it, were beginning to appear. But, before 1832, this process was only in its initial stages.[5] It was not till the Reform Act swept away the influence which the Crown was able to exercise over Parliament, that the Cabinet could assume its modern rôle, and emerge not only as the only link between the Legislature and the Executive, but as so effective a link that, as Bagehot said,[6] it entirely negatived the eighteenth-century theory of separated powers. It was not till then that the eighteenth-century conventions of the constitution, which centred round the link of influence, were superseded by the modern conventions which centre round the cabinet.

At this point I must examine the nature and effect of these two links between Parliament and the central government. I shall say something, first of the old link which was provided by the use made of the system of representation in the unreformed House of Commons; and, secondly, of the beginnings of the process which, after 1832, substituted for that link, the new link of the cabinet.

(1) *The old link of influence.*

Of the manner in which the system of representation in the unreformed House of Commons was worked, so that it gave both the Crown and the House of Lords a partial control over

[1] Bagehot, Essays on Parliamentary Reform 152.
[2] Above 102; below 642.
[3] Above 116-118; below 642-643.
[4] Below 643.
[5] Below 643.
[6] Above 629.

the House of Commons, I have already spoken.[1] It is obvious that it was a link between Parliament and the central government, because it ensured that the government would have a certain number of supporters in the House of Commons, who were kept together by the use of the large patronage at the disposal of the government. That this link of influence was the chief link between the Legislature and the Executive was obvious to many contemporary students of the eighteenth-century constitution. Hume,[1] having pointed out that the power of the House of Commons "is so great that it absolutely commands all other parts of the government," asks why it is that it has not reduced both the King and the House of Lords to insignificance. He says:

> I am sure that the interest of the body is here restrained by that of individuals, and that the House of Commons stretches not its power, because such an usurpation would be contrary to the interest of the majority of its members. The crown has so many offices at its disposal that, when assisted by the honest and disinterested part of the House, it will always command the resolutions of the whole so far, at least, as to preserve the antient constitution from danger. We may therefore give to this influence what name we please; we may call it by the invidious appellations of *corruption* and *dependence*; but some degree and some kind of it are inseparable from the very nature of the constitution, and necessary to the preservation of our mixed government.

Paley[3] so thoroughly agreed with this view, that he considered that it was due to the fact that the Crown had no similar means of influencing the colonial Assemblies, that the disturbances in America arose, and that the American colonies were lost. To his mind a series of conventions depending upon influence was as necessary to the harmonious working of their constitutions in the eighteenth century, as the introduction of responsible government, that is the introduction of the series of conventions which centre round the modern cabinet, proved to be necessary to their harmonious working in the nineteenth century. With this view Adam Smith agreed. He pointed out that it was very improbable that the colonial Assemblies would ever be induced to vote a sufficient supply to support their share of the expense of the government of the empire, because the King had not the same means of managing them as he had of managing the British Parliament.[4] Moreover in a later passage he pointed out that

[1] Above 577-580. [2] Essays i 120-121.

[3] Principles of Moral and Political Philosophy (2nd ed.) 493-494.

[4] "It was only by distributing among the particular members of Parliament a great part either of the offices, or of the disposal of the offices arising from this civil and military establishment, that such a system of management could be established, even with regard to the Parliament of England. But the distance of the colony Assemblies from the eye of the sovereign, their number, their dispersed situation, and their various constitutions would render it very difficult to manage them in the

the King of France could quite easily have managed the Parlements in the same way if he had taken the trouble to do so.[1] The same view as to the effect of influence in creating a link between the Legislature and the Executive, was taken by Paine [2] and by the authors of the *Federalist*.[3] It was because Paley and Burke and many others believed that this link of influence, and the series of conventions which centred round it, were absolutely necessary to the working of the constitution, that they were opposed to all proposals for Parliamentary reform.[4]

This link of influence between the Legislature and the Executive had, as Bagehot has pointed out, two serious defects. First, posts in the government departments were used to bribe members of Parliament; and, in order to increase the fund available for bribery, sinecures and obsolete or semi-obsolete offices were carefully preserved throughout these departments.[5] Consequently the executive power of the state was very weak. Riots and crimes of violence were frequent; and the way in which the rebellion of 1745, and the war with America, were handled, are two other striking instances of inefficiency.[6] Secondly, the working of this system of influence tended to make ministries unstable. "It failed at the moment at which it was especially wanted." If it seemed likely that a minister would fall, he could confer no more favours, and therefore the bond which united his party disappeared. "A man who wanted places would wish to support, not the administration which was about to go out, but the administration which was

same manner, even though the sovereign had the means of doing it; and those means are wanting," Wealth of Nations (Cannan's ed.) ii 118; in 1774 it was pointed out that the practice of giving away places in the colonies to men in this country left the governor without the means of influence, and would "totally annihilate the power of any supreme officer in that country," Parlt. Hist. xvii 1194.

[1] "A very small experiment, which the duke of Choiseul made about twelve years ago upon the parliament of Paris, demonstrated sufficiently that all the parliaments of France might have been managed still more easily in the same manner. That experiment was not pursued. . . . The French government could and durst use force, and therefore disdained to use management and persuasion," Wealth of Nations (Cannan's ed.) ii 284.

[2] In his Common Sense (ed. 1776) 5-6 he says, "that the crown is this overbearing part in the English constitution, need not be mentioned, and that it derives its whole consequence merely from being the giver of places and pensions, is self-evident; wherefore, though we have been wise enough to shut and lock a door against absolute monarchy, we at the same time have been foolish enough to put the crown in possession of the key."

[3] Having pointed out that half the House of Commons was elected by five thousand seven hundred and twenty-three persons, it is pointed out that this half is "more frequently the representatives and instruments of the Executive magistrate, than the guardians and advocates of popular rights. They might therefore, with great propriety, be considered as something more than a mere deduction from the real Representatives of the Nation," The Federalist no. lv.

[4] Above 113, 631-632.

[5] Essays on Parliamentary Reform 154, 167-168; above 519.

[6] Ibid 164-166; above 70, 103-105.

just coming in." Therefore though this system gave great power to a ministry so long as it could retain office, it made a weak ministry still more weak.[1]

On the other hand, it can, I think, be maintained that it was only by means of this system that it was possible for the Crown and the House of Lords to maintain their independent powers; so that it was the final and effective cause of the maintenance of the balance of power in the constitution. If, as most eighteenth-century statesmen thought,[2] the maintenance of that balance was a desirable thing, the fact that this link of influence secured it must be set down to its credit. But it is obvious that a balance of powers thus secured was necessarily unstable. Most of the influence, by means of which the harmonious working of Parliament and the central government was secured, consisted in the use of royal patronage. It was therefore always open to the King to insist that he must control this patronage. George III insisted upon controlling it in order that he might gain real power; and his success in gaining this control gave him an influence which Wilkes and Fox once said was irresistible.[3] It was the disastrous use which he made of the power which he had thus gained, which proved that this link of influence could be so used that it destroyed the balance of the constitution. Therefore the opposition, when it gained power, passed measures of economic reform, measures disabling contractors from sitting in the House of Commons, and measures disfranchising revenue officers.[4] This was the first weakening of this link of influence between Parliament and the central government, and, therefore, as we shall see, it was the beginning of the process which substituted for that link the link of the cabinet.

This process was assisted by the fact that the two political parties in the state were then taking their modern shape. The new Tory party created by George III was now divided from the Whig party by a real difference of opinion as to the position of the Crown in the state. But the process was very slow. The French Revolution created the schism between the old and the new Whigs. The old Whigs, led by Burke, joined the Tory party, and left the new Whigs, who approved of the French Revolution, in an inconsiderable minority. It was not till the new Whigs won the support of the nation for the Reform Act of 1832, that this link of influence between Parliament and the central government was finally destroyed, and the cabinet assumed its modern rôle as the only link between these two parts of the constitution.[5]

[1] Bagehot, Essays on Parliamentary Reform 157-159.
[2] Above 525-526; below 714-716.
[3] C. Butler, Reminiscences (4th ed.) i 74
[4] Above 107, 522-523.
[5] Below 643.

To the beginnings of the process which gave to the cabinet this position in the constitution we must now turn.

(2) *The new link of the cabinet.*

I have traced the process by which a small committee of ministers, called the cabinet, holding the chief offices in the state, superseded the Privy Council as the governing body of the country.[1] The constitutional position of the eighteenth-century cabinets was very different from that of a modern cabinet, because, though they formed a link between Parliament and the central government, they were a link of very minor importance compared to the link of influence—of such minor importance that they are not mentioned either by Blackstone or Paley. They did not, like a modern cabinet, fuse Parliament and the central government: at most they helped to strengthen the liaison created by influence between three independent powers—the Crown, the House of Commons, and the House of Lords.

The cabinet helped to strengthen this liaison between Parliament and the central government in the following three ways: In the first place, no individual minister could continue to hold office if the House of Commons was definitely opposed to him. Walpole resigned as soon as he lost his majority in the House of Commons;[2] Bath and Granville in 1746 were obliged to give up their attempt to form a ministry for the same reason;[3] and the Fox-North coalition of 1783 compelled Shelburne to resign.[4] In the second place, the King could not refuse to give office to a minister, like the elder Pitt, whom both public opinion and the House of Commons demanded.[5] In the third place, no ministry could pursue a policy to which the House of Commons was definitely opposed. Burke said:

> Every sort of government ought to have its administration correspondent to its legislature. If it should be otherwise, things would fall into a hideous disorder. The people of a free commonwealth, who have taken such care that the laws should be the result of general consent, cannot be so senseless as to suffer their executory system to be composed of persons on whom they have no dependence.[6]

Walpole gave up his Excise scheme when he found that the nation and the House of Commons were definitely opposed to it;[7] and in 1782 North told George III that "the Prince on the Throne, cannot with prudence, oppose the deliberate resolutions of the

[1] Above 468-481.

[2] Above 76; in 1739 Walpole is reported as saying, "I speak as possessing my powers from his Majesty, but as being answerable to this House for the exercise of those powers," Parlt. Hist. x 946.

[3] Above 78. [4] Above 110. [5] Above 84.

[6] Cause of the Present Discontents, Works (Bohn's ed.) i 333.

[7] Above 71.

House of Commons." [1] But the liaison was very loose. The resignation of a particular minister did not necessarily mean the resignation of the whole cabinet—at the beginning of George III's reign Newcastle remained in office after Pitt had resigned; and a defeat in the House of Commons, even upon so important a measure as the Peerage Bill of 1719, did not necessitate the resignation of the ministry—in 1779 George III told North that ministers must "not mind being now and then in a minority." [2]

The looseness of this liaison was in fact the inevitable consequence of the position which, in the opinion of all parties, the King took in the government of the state. All persons thought of the government as his government. The phrase "His Majesty's Government" was no mere political fiction, but so real and substantial a fact, that the leading statesmen of the day repeatedly expressed their intention not to enter into "a formed or general opposition," that is an opposition to all government measures designed to force the King to appoint as his ministers, or to remove from office, particular persons. An opposition to particular measures or to a particular policy was justifiable; but not an indiscriminate opposition to all government measures in order to bring about the downfall of the government.[3]

It was the king's business to see the government of the nation carried on, and for that purpose he had a right to choose his "instruments"; and "support of government" was considered "a duty, while an honest man could support it." To try to impose oneself on the king by means of a systematic opposition, "to force a change of hands," was considered by them factious and dishonest, and replete with guilt.[4]

To these statesmen the phrase "His Majesty's Opposition" would have been a contradiction in terms.

It follows that the cabinet was regarded literally as a body of the King's servants, through whom he chose to carry on the government. They could not carry on that government unless they could get a general support from Parliament; and Parliament might make the position of a particular minister or set of ministers so impossible that it would be necessary for them to resign. But, subject to this general control by Parliament, first, the relation of the cabinet as a whole to the King, and, secondly, the relation of individual members of it to the King, were very much more close than its or their relation to Parliament.

[1] Fortescue, Papers of George III v 395.

[2] "I am convinced this country will never regain a proper tone unless ministers, as in the reign of William III, will not mind being now and then in a minority particularly on subjects that have always carried some weight with popular opinions; if it comes to the worst the bill will be thrown out in the House of Lords," Fortescue, Papers of George III iv 275.

[3] Namier, The American Revolution 55-59.

[4] Ibid 58.

First, the King had a very direct influence upon the composition of the cabinet. Partly by reason of his position as King, and partly by reason of his influence over both Houses of Parliament,[1] it was absolutely necessary for the cabinet to possess the favour of the King. The death of William III meant the accession of a Tory ministry; and it was generally thought that the accession of George II would necessarily mean the downfall of Walpole.[2] George III on his accession at once made the duke of York and the earl of Bute members of the cabinet;[3] and many thought that the accession of George IV would bring about a change of ministry.[4] Secondly, most of the business of state was transacted by the individual ministers with the King. Matters were not brought before the cabinet without the King's permission. As in the reign of William III,[5] so in the reign of George III, some thought that the King had the right, on a question of foreign policy, to act on the advice of a single minister, unless the question had been expressly referred by the King to the cabinet.[6] In 1782 George III and Shelburne agreed that the proper course was for the minister in charge of each department to advise the King in the first instance, and to ask his permission to lay the matter before the cabinet—not for the business to be laid first before the cabinet, which would then advise the King.[7] The authors of *The Federalist*[8] were quite right when they said that "the King is not bound by the resolutions of his Council, though they are answerable for the advice they give. He is the absolute master of his own conduct in the exercise of his office; and may observe or disregard the counsel given to him at his sole discretion."

Four consequences followed from the nature of the relations of the cabinet as a whole and its individual members to the King.

First, because the government was the King's government,

[1] Above 580. [2] Above 68.

[3] Walpole, Memoirs of George III i 8.

[4] Bagehot, English Constitution 284-285.

[5] Anson, The Crown (4th ed.) ii Pt. i 100-101; above 473.

[6] On October 2 1761, Granville said, "that he [Pitt] knew very well that the King might take a foreign measure with his secretary of state only, but that if the King referred the matter to the council the opinion of the majority of the council was the measure," Add. MSS. 32929, f. 18, cited Winstanley, E.H.R. xvii 691.

[7] Shelburne wrote, "I conceive the natural course of business to be, first for the Department to submit any business to Your Majesty, and to be consider'd afterwards by the Cabinet under Your Majesty's Reference," Fortescue, Papers of George III v 503; the King replied, "Certainly it is quite new for business to be laid before the Cabinet and consequently advice offered by the Ministers to the Crown unasked; the Minister of the Department used always to ask permission of the King to lay such a point before the Cabinet, as he couldn't chuse to venture to take the direction of the Crown without such sanction; then the Advice came with propriety," ibid 504-505; see ibid vi 143, 153, for cases where a minister asked the King's permission to lay a matter before the cabinet.

[8] No. lxix.

it was open to him to get advice from other persons besides his ministers. The House of Lords was a council of the Crown,[1] and individual Lords could be regarded as the Crown's hereditary councillors.[2] We have seen that Earl Temple in 1783 justified the measures which the King had taken, in concert with himself, to throw out Fox's India Bill in the House of Lords, on this ground.[3] We have seen too that, in the eighteenth century, a distinction had grown up between the efficient and non-efficient members of the cabinet.[4] Ministers who had resigned and had gone into opposition, though they had ceased to belong to the inner circle of efficient members, were still members of the outer circle of non-efficient members,[5] and could still be consulted by the King.[6] Secondly, both because the relations of the King with the House of Lords were particularly intimate,[7] and because many of the peers possessed a large influence over the elections to the House of Commons,[8] the cabinets of the eighteenth century were staffed very largely by peers or by men intimately related to peers.[9] Similarly, because the cabinet was literally a committee of the King's servants, they contained a number of persons who held high positions in the Church or the royal household, but who had no connection with the administrative departments of the state.[10] Thirdly, the principle that all the members of the cabinet were collectively responsible for national policy was not recognized; and fourthly, and consequently, no such person as the Prime Minister of our modern constitutional law had emerged. Let us look a little more in detail at these two last-named consequences.

The principle of the collective responsibility of the cabinet could not emerge when the government was regarded as being essentially the King's government, and when the King had the right to act on the advice of a single minister, on the advice of a member of the outer circle of the cabinet, and even on the advice of a peer who was not a cabinet councillor. It is true that in the reigns of George I and George II, when Walpole was in power and ruled through a cabinet which represented the dominant section of the Whig party, there was a homogeneous cabinet, which at first sight, appears to be collectively responsible for national policy. But this appearance is delusive. Walpole dominated his cabinets, and the national policy was the policy which he

[1] Above 611-612. [2] Above 612.
[3] Above 612; Turberville, The House of Lords in the XVIIIth Century 412.
[4] Above 479-480.
[5] Anson, The Crown, ii Pt. i 114-115; above 480.
[6] Fortescue, Papers of George III ii 255, cited above 480 n. 7.
[7] Above 617. [8] Above 576.
[9] Turberville, The House of Lords in the XVIIIth Century 161, 189, 256; above 613.
[10] Above 462.

and the King and Queen approved.[1] When he fell even this appearance of collective responsibility disappeared. Cabinets were formed from the adherents of several different groups with many different aims. "The Grenville connection," says Anson,[2]

represented the ambitions of the Grenville family; the Bedford group, a desire for the emoluments of office; the followers of the elder Pitt were the admirers of a great but somewhat wayward personage; the Rockingham Whigs desired to make the King subservient to a party which should consist of the great Whig families; George III and his friends represented antagonism to this policy. A cabinet formed out of any combination of these groups was not likely to possess any strong sense of mutual loyalty or collective responsibility.

In 1755 Pitt the paymaster of the forces and Fox the secretary at war made a practice of attacking Murray the attorney-general and Robinson the secretary of state.[3] Lord Camden, though a member of the duke of Grafton's administration, repudiated the actions of the ministry in relation to Wilkes and the Middlesex election, and in relation to the tea duties on the American colonies.[4] Both in the second Rockingham administration and earlier Lord Chancellor Thurlow often opposed his colleagues;[5] and the King would sometimes refuse to dismiss ministers who pursued this course.[6]

Under these circumstances it is clear that no such person as the Prime Minister of our modern constitutional law could emerge. There could be no minister who was regarded by the King as the head and representative of the Cabinet, as primarily responsible for the conduct of the government, and as entitled

[1] In 1735, Hervey, Memoirs ii 181, says, "whatever step Sir Robert Walpole took in England with regard to these negotiations, though concluded solely . . . in reality by the Queen and him in her closet, wore the face of being always as much the act of the whole Cabinet Council as theirs. . . . Sir Robert Walpole with a dexterity equal to his power, whilst in fact he did everything alone, was responsible for nothing but in common, whilst those ciphers of the Cabinet signed everything he dictated."

[2] The Crown ii Pt. i 117-118.

[3] They "could not decently obstruct the public business, or censure those measures which they themselves had already approved of. But still they might attack persons, though not things; or might oppose in questions of an indifferent nature, where the affairs of government did not appear to be immediately concerned," Waldegrave, Memoirs 31; cp. ibid 80-81 for the way in which in 1756 Newcastle treated Fox, who was then his secretary of state.

[4] Anson, The Crown ii Pt. i 117; for the criticisms of Lord North and information of differences of opinion among the ministers, which were sent to the King, see Fortescue, Papers of George III iv 471-472, 478, 481, 505; in 1779 Jenkinson wrote to the King that the attorney-general had told him that he had resolved "not to have any personal intercourse with Lord North," ibid 471; for the differences between Shelburne and Rockingham, see ibid v 443, 453-454, 502-503; vi 47.

[5] The House of Lords in the XVIIIth Century 401; see Fortescue, Papers of George III iv 500-501; North, writing to the King in 1778, says, "the Chancellor not only strongly reprobates the conduct of Lord North in the meetings of the cabinet, but in his communications with several persons repeats that it is necessary that Lord North should be removed."

[6] Walpole, Memoirs of George III ii 331.

to the first place in the confidence of the King, so long as he could gain the support of Parliament for his policy. It is true that we sometimes get a minister who is *de facto* the first minister—Walpole and the elder Pitt are obvious examples. But Walpole repudiated the title ; [1] in many of the cabinets of the eighteenth century it would be difficult to discover such a minister ; [2] and, when we discover him, his position is essentially different from that of a modern Prime Minister. We have seen that Walpole owed his position as much to the support of the Crown, which he retained by careful management, as to his control over Parliament ; [3] and the elder Pitt fell, in spite of all his achievements, when George III withdrew his support.[4] In fact, the general opinion was that a first minister who controlled the cabinet, and engrossed the favour of the King, was unconstitutional.[5] This fact is illustrated by a dialogue between Lord Hardwicke and the King in January 1745, part of which runs as follows : [6]

Chancellor.—" Your Ministers, Sir, are only your instruments of Government."

King (smiles).—" Ministers are Kings in this country."

Chancellor.—" If one person is permitted to engross the ear of the Crown, and invest himself with all its power, he will become so in effect ; but that is far from being the case now, and I know no one in Your Majesty's service that aims at it."

If the government was really the King's government, if in fact and in theory the King was regarded as its director, a Prime Minister of the modern type was constitutionally impossible. " Hardwicke was right when he told George II that Ministers were not ' Kings ' so long as there was no Prime Minister ; for obviously there must be a supreme direction, and this, according to Hardwicke and his contemporaries, had to come from the King." [7]

For all these reasons the constitutional position of the cabinet, during the greater part of the eighteenth century, differed essentially from the constitutional position of the modern cabinet ; and, as the result of this difference, it had not yet assumed its leading modern characteristic of " a combining committee," which " fastens the legislative part of the state to the

[1] Parlt. Hist. xi 1380, cited by Anson, The Crown Pt. i 116.

[2] Anson, The Crown ii Pt. i 127-128.

[3] Above 61. [4] Above 90.

[5] In 1741 it was said in a protest in the Journals of the House of Lords that a prime minister was inconsistent with the constitution, and destructive of liberty, Turberville, The House of Lords in the XVIIIth Century 247 and the references there cited ; in 1761 Grenville said that " Prime Minister was an odious title," Walpole, Memoirs of George III i 113.

[6] Cited by Namier, The American Revolution 53, from Add. MSS. 35870 ff. 87-91.

[7] Namier, op. cit. 54.

executive." [1] The principal link between the Legislative and the Executive was that system of influence which was rendered possible by, and took its shape from, the condition of the representation in the unreformed House of Commons; and it was very far from effecting that almost complete fusion which the cabinet has effected since 1832. But, at the end of the century, there are signs that the link of the cabinet is being strengthened, and that the link of influence is being correspondingly weakened. This was due to a series of modifications in the eighteenth-century cabinet system, which were caused by the rise of a "formed and general opposition," during the ministry of Lord North.[2]

In the first place, the hardening of party lines, which the rise of such an opposition implied, made for the growth of the idea of a cabinet collectively responsible for national policy. In 1779 George III thought that he might strengthen his government by taking in some members of the opposition, and so avoid the disagreeable necessity of surrendering to the opposition. "It must," he said, "be coalition with my administration, not the yielding the reins of government to opposition." [3] But both North and Thurlow assured him that this was impossible.[4] In the second place, and as the result of this hardening of party lines, the theory, fostered by the existence of an outer circle of cabinet councillors, that the cabinet might consist of other persons besides those who held responsible office, was got rid of. The view that the cabinet should consist only of those persons who held responsible office was, as we have seen, hinted at by Sunderland in 1701; [5] but we have seen that it was wholly disregarded during the greater part of the eighteenth century; [6] and it was not till 1801 that it was formally stated. In that year Eldon succeeded Loughborough as Lord Chancellor; but Loughborough continued to attend meetings of the cabinet. Addington was obliged to tell him that, after his resignation, he was no longer entitled to attend cabinet meetings; and he took occasion to lay down the principle that, "the number of cabinet ministers should not exceed that of the persons whose responsible

[1] Bagehot, The English Constitution 14. [2] Above 102.

[3] Fortescue, Papers of George III iv 477; and see ibid 520; v 4-5, 378, 387, 392-393.

[4] In 1778 North wrote to the King: "He believes it may be possible to obtain an acquisition from the opposition, but he is afraid that it cannot be done on the terms proposed by His Majesty; Lord Chatham will expect to place his friends in the most responsible offices and to have a majority in the Cabinet. Lord Rockingham having many more followers will expect more," ibid iv 85; in 1779 the King, writing to Thurlow, said, "you told me you were convinced that any proposition of this sort made in my name would be declined, as members of opposition would not consent to join any of my present ministers," ibid iv 520; cp. also North's letter to the King in 1782, ibid v 395-396.

[5] Above 472. [6] Above 479-480.

situations in office require their being members of it." [1] *A fortiori* the idea that, because the peers were the hereditary councillors of the Crown, the King could ask, and the peers could give, advice to the Crown, was got rid of.[2] In the third place, the greater solidarity of the cabinet, which resulted from these changes, made it necessary that there should be a real Prime Minister to preside over and to represent the cabinet. Lord North had recognized this need as early as 1778. He said :

> In critical times it is necessary that there should be one directing minister, who should plan the whole of the operations of government, and controul all the other departments of administration, so as to make them co-operate zealously and actively with his designs even tho' contrary to their own.[3]

This is an early statement of the principle finally laid down by Pitt in 1803, when he told Dundas that it was "an absolute necessity in the conduct of the affairs of this country that there should be an avowed and real minister possessing the chief weight in the Council and the principal place in the confidence of the King. The power must rest in the person generally called the First Minister." [4]

None of these principles were quite clearly recognized in 1793 ; but they were beginning to emerge ; and their emergence was changing profoundly the position of the cabinet. Even if the reform of Parliament had been carried out in a more gradual and a less sweeping form than it was carried out in 1832, the cabinet would have increased in importance as a link between the Legislature and the Executive as compared with the link of influence. If the reform of Parliament had been so carried out, the link of influence might have lasted longer, and both the Crown and the House of Lords might have retained some part of those independent powers which they possessed in the eighteenth century. The eighteenth-century constitution of separated powers might not have been so quickly overwhelmed by a House of Commons, which was able to compel the Crown to accept the ministers whom it approved, and, with the help of the prerogative of the Crown thus turned to its own uses, to reduce the House of Lords to the position of a very secondary chamber.

But these are later developments. We must turn back to the eighteenth century, and examine the other great division of the powers of government recognized in that century—the

[1] Anson, The Crown ii Pt. i 116; but as M. Halévy has pointed out, History of the English People in 1815 (Eng. tr.) 22 n. 2, even as late as 1807 all the members of the cabinet were not always consulted ; see Journal of Lady Holland ii 211 there cited.

[2] Above 612.

[3] Fortescue, Papers of George III iv 215-216.

[4] Anson, The Crown ii Pt. i 128.

division between the Parliament and the Crown on the one hand, and the Law Courts on the other.

VI

The Law Courts and the Liberties of the Subject

The clause of the Act of Settlement which removed the judges from the political arena by giving them security of tenure,[1] and the Acts of Anne and George III which provided that their tenure of office should not be affected by the demise of the Crown,[2] gave to the courts the great position which they occupy in our modern constitution. Ever since the Revolution they have been the guardians of the supremacy of the law; and, acting as impartial umpires between many different governmental authorities and the subject, they have defined and enforced the powers of these authorities and the liberties of the subject in a manner which has preserved that national affection and respect for the law which has, from an early period in our legal history, been a marked national characteristic.[3] When in 1761 George III declared that "he looked upon the independence and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the Crown,"[4] he was not only expressing the view universally held in the eighteenth century, but also a political truth of universal application. The independence of the judges is and always must be the best of all securities for the stability of a state for four connected reasons: First because it ensures that the judges, to whom the duty of defining and regulating the powers and duties of the persons and bodies exercising governmental functions is entrusted, carry out this important duty impartially. Secondly, because, as against those persons and bodies, it guarantees the liberties of the subject. Thirdly, because it creates a law abiding habit in the nation. Fourthly, because it grounds the authority of the state upon the rule of law. It was because the judges had attained this position in the eighteenth-century constitution, it was because they used that position to secure these four results, that that constitution commanded the enthusiastic approval of most Englishmen, and

[1] Vol. i 195; vol. vi 234.

[2] 6 Anne c. 7 § 8; 1 George III c. 23; vol. i 195; Lecky, History of England iii 188; above 433.

[3] Vol. ii 417, 435-436, 477; vol. v 435-436.

[4] Cited Bl. Comm. i 268 from the House of Commons' Journals, March 3 1761.

was praised by continental political thinkers.[1] A short examination of these four results of the independent position of the judges will show that there was some ground for this approval and this praise.

(1) *The definition of the powers of governmental authorities.*— We have seen that the eighteenth-century constitution was extraordinarily complex. Whether we look at the system of local or at the system of central government, we see a number of independent units with a long history, which had gradually evolved, and were gradually evolving, to meet new needs. Since their powers and their relations to each other were often very uncertain, there would have been an obvious danger that the subject would be exposed to the risk of arbitrary exercises of power, and that conflicts of jurisdiction would arise between them, if the courts had not been able both to protect the subject, and to define their powers and jurisdictions. We have seen that in the sphere of local government the courts defined the relations between the central and local government, between the different units of the local government, and between these units of local government and the subject;[2] that they controlled all the units of local government;[3] and that, as the result of this control, they were beginning to create special bodies of local government law.[4] In the sphere of central government we have seen that the courts defined both the powers of the executive and the rights and liberties of the subject;[5] and, consequently, we shall see that, during this century, many parts of that branch of constitutional law which is concerned with the definition of these rights and liberties were elaborated.[6] It is true that the relations between Parliament and the Crown,[7] and the relations between the two Houses of Parliament,[8] were regulated rather by political conventions than by law. But the rights and privileges of the two Houses of Parliament were part of the law; and we have seen that Holt, C.J., had not hesitated to assert the right of the courts to resist claims to exercise privileges which were not recognized by the law.[9] It is not too much to say that, unless the courts had thus been able to hold the balance between the many persons and bodies exercising governmental functions in the eighteenth-century constitution, unless they had been recognized, to use Blackstone's words, as "the grand depositaries of the fundamental laws of the kingdom,"[10] that constitution would have been almost unworkable.

[1] Below 714-716. [2] Above 155-158, 243-254. [3] Ibid.
[4] Above 256 seqq. [5] Above 416-417. [6] Below 650 seqq.
[7] Above 525-526, 630-631. [8] Above 626-629. [9] Vol. vi 270-272.
[10] "At present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which

At any rate, if it had been made to work, there would have been very small security for the liberty of the subject.

(2) *The safeguarding of the liberties of the subject.*—The fact that the possession and use of these powers of the courts afforded the best of all securities for the preservation of the liberties of the subject, was rightly regarded by statesmen and lawyers of the eighteenth century, both English and foreign, as their most important and most salutary effect.[1] Blackstone's analysis of this effect of the powers of the courts, is the best summary of, and justification for, the belief universally held on this matter in the eighteenth century.[2] His words are as true to-day as when they were written; and we have seen that the vast mass of powers, which a democratic and socialist House of Commons confers upon the agents of the executive government, makes it even more necessary now, than it was in the eighteenth century, to insist upon the maintenance of this security for the liberty of the subject.[3]

(3) *The creation of a law-abiding habit.*—When we read of riots in the towns and sometimes in the country, of which the Gordon riots were only the most striking example[4]; when we read of the exploits of the ubiquitous highwaymen[5] and of the futile savagery of the penal code;[6] it may seem absurd to claim that the nation was law abiding. And yet there is a sense in which it is not absurd to make this claim. From the mediæval period onwards, the appeal of those who were discontented with the policy pursued by the state has been either an appeal to the courts for the proper enforcement or for the proper interpretation of the law, or an appeal to Parliament for a change in the law.[7] In the great constitutional controversies of the seventeenth century both sides appealed to the law, as they interpreted it, to justify their claims.[8] Both in the seventeenth and the eighteenth centuries persons or parties who complained of grievances

are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter but by Act of Parliament," Comm. i 267.

[1] Below 714-716, 722-724. [2] Comm. i 269-270, cited above 417.

[3] Above 417.

[4] Above 144 n. 1; Walpole, Memoirs of George III ii 155-159; iii 198, 204, 219-221; Grafton, Autobiography 188-189; P. C. Yorke, Life of Hardwicke i 92-93, 131-133, 155-156; Bagehot, Essays on Parliamentary Reform 164-166; Lecky, History of England ii 113; iii 322-326; see Calendar of Home Office Papers, 1760-1765, 538, 592, 595, 596 for illustrations of the constant use which the government were obliged to make of the army, in the absence of any effective police.

[5] Vol. vi 310, 405-406; Lecky, op. cit. vii 338-341; above 144; vol. xi 566.

[6] Ibid 562-566; Walpole, Memoirs of Last Ten Years of George II i 224; Bl. Comm. iv 18; Lecky, op. cit. vii 316-323.

[7] Vol. ii 255; vol. iv 187-188. [8] Vol. vi 29-30, 103.

appealed to Parliament to alter or to add to the law. There was never any attempt to overturn the existing machinery of law and government. On the contrary, it was assumed that the existing machinery of the courts and Parliament was sufficient to redress all grievances. It is for this reason that both the local and the central government were able, generally, to keep the peace with a force of constables which was ludicrously inadequate.[1] It is not surprising that there should have been occasional riots. It is not surprising that crimes of violence should have been frequent. What is surprising is that civilized life was possible, that trade and commerce and art and literature should have flourished, with a protection so inadequate. The reason is that there was no organized body of persons who were so discontented with the existing order that they wished to attack it. The vast majority of persons were satisfied with it; and those who had serious grievances knew that they could appeal to the courts or to Parliament. For the individual the former appeal was generally the more available remedy: for groups of persons both appeals were open. Thus the habit of appealing to the law was perpetuated; and because the judges of the common law courts were deservedly trusted, it can be maintained that, in spite of an inefficient machinery for the enforcement of the law, the nation as a whole was law abiding.

(4) *The basing of the authority of the state upon the rule of law.*—As the result of all these consequences of the independence of the courts, the doctrine of the rule or supremacy of the law was established in its modern form, and became perhaps the most distinctive, and certainly the most salutary, of all the characteristics of English constitutional law. This doctrine has, as we have seen, been recognized in different forms from a very early period in English legal history; and a very short recapitulation of its earlier phases will be sufficient to explain the form which it assumed in the eighteenth century and in our modern law.

The doctrine of the rule or supremacy of law is derived directly from the mediæval theory that law of some kind—the law either of God or man—rules the world.[2] Bracton stated this theory,[3] and deduced from it the proposition that the King and other rulers were subject to law.[4] The law, he said, bound all the members of the state, whether rulers or subjects, and justice according to law was due to all.[5] This theory was accepted by

[1] Above 144 and n. 5.

[2] Vol. ii 121-122, 131-132.

[3] Ibid 253-255.

[4] "Ipse autem rex, non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem," Bracton f. 5 b; "non est enim rex ubi dominatur voluntas et non lex," ibid.

[5] "In justitia recipienda minimo de regno suo [rex] comparatur," ibid f. 107.

the lawyers of the fourteenth and fifteenth centuries.[1] "The law," it was said in 1441,[2] "is the highest inheritance which the King has; for by the law he and all his subjects are ruled, and if there was no law there would be no King and no inheritance." The growth of the financial and legislative powers of Parliament in the fourteenth and fifteenth centuries both emphasized and modified this theory. That the rise of the power of Parliament emphasized the theory, is shown by the way in which Fortescue used it to justify the control which Parliament had gained over legislation and taxation.[3] That the same cause modified it, is shown by the manner in which it was combined with the doctrine of the supremacy of Parliament. The law was supreme, but Parliament could change and modify it.[4]

In some continental countries, notably in France, this theory of the rule or supremacy of law took the form of the assertion of a supreme fundamental law, which no power in the state could change, and only the lawyers could interpret.[5] A theory so unpractical ceased to exert much influence when, in the sixteenth century, the royal power made good its claim to sovereignty.[6] In England the theory took the more practical form of the assertion of the supremacy of a law which was subject to the control of Parliament. This was the accepted form of the theory throughout the sixteenth century. Henry VIII in all constitutional questions scrupulously observed the letter of the law;[7] and Bacon, in his argument in *Calvin's Case* in 1609, could say that "law is the great organ by which the sovereign power doth move."[8]

The only period in our legal history when this form of the theory of the supremacy of the law was seriously questioned was the Stuart period. James I evolved the theory that the prerogative was by divine appointment the sovereign power in the state, and that therefore the King, by virtue of his prerogative, could override the law whenever he pleased.[9] Coke was dismissed from the bench because he asserted the supremacy of the law.[10] But Coke had Parliament on his side, and his views as to the supremacy of the law were accepted by Parliament when it passed the Petition of Right in 1628,[11] and when it abolished the court of Star-Chamber and the jurisdiction of the Privy Council in England in 1641.[12] These views finally triumphed as the result of the Great Rebellion and the Revolution of 1688. In this, as in other

[1] Vol. ii 435-436, 441.
[2] Y.B. 19 Hy. VI Pasch. pl. 1.
[3] Fortescue, De Laudibus c. 18; The Governance of England c. 3; vol. ii 441.
[4] Ibid 441-443.
[5] Vol. iv 169-172.
[6] Ibid 172-173, 192-197.
[7] Ibid 201, 283.
[8] Works (ed. Spedding) vii 641, cited vol. iv 201.
[9] Vol. vi 11-12, 276.
[10] Vol. v 440-441.
[11] Ibid 453-454.
[12] Vol. i 514-516; vol. vi 112.

matters, Coke's writings passed on the views of the mediæval English lawyers into modern law. But they passed them on with one important addition, which was a consequence of the rise, in the sixteenth century, of the modern territorial state and of other bodies of law in that state outside the sphere of the common law. The law to which Coke attributed this supremacy was the law of the modern English state; and so the doctrine of the rule of law has come to mean the supremacy, not only of the common law, but of the whole law of England, so long as Parliament sees fit to leave it unchanged. Therefore the law which rules is the whole law of England, whether enacted or unenacted.

Thus the doctrine of the rule of law means first "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the influence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the government"; [1] and secondly it means "equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts." [2] These were the most important of all the constitutional results which flowed from the independent position which the courts had attained in the eighteenth century; and the fact that they had been attained afforded one of the greatest contrasts between the public law of England and that of continental states.[3] And from these results another very important result has emerged. Because, in the sixteenth and seventeenth centuries, the common law had been victorious in the struggle for supremacy with rival courts and councils, and because the courts which administered it were independent, many of those branches of English law, which define the constitutional rights of the subject as against the Crown, have continued to be evolved by the courts as branches of the common law, and in the same manner as other branches of the common law. They have been evolved by judgments in decided cases, in which the courts have been set to decide the rights of the parties to a concrete dispute. And so we get the third meaning which is connoted or implied in the phrase "the rule of law"—"the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals as defined and enforced by the courts." [4]

[1] Dicey, Law of the Constitution (7th ed.) 198. [2] Ibid.

[3] Horace Walpole, speaking of the trial by the House of Lords of Earl Ferrers for murder, says, "the foreigners were struck with the awfulness of the proceeding—it is new to their ideas to see such deliberate justice, and such dignity of nobility, mixed with no respect for birth in the catastrophe, and still more humiliated by anatomizing the criminal," Letters (ed. Toynbee) iv 374.

[4] Dicey, op. cit. 199.

Some of these branches of constitutional law, which have been thus developed as branches of the common law, have old roots. We can find some of their origins in the mediæval common law. There are, for instance, in the Middle Ages, clear traces of the common law doctrines as to the powers of the Crown and its servants and subjects to deal with riots, rebellions, and invasions,[1] and of the doctrine that the servants of the Crown are personally responsible to the law for wrongs committed by them in their official capacity.[2] But these branches of constitutional law could not easily develop so long as the jurisdiction of the Council and Star Chamber was in existence, and could not freely develop so long as the judges were dependent on the Crown. Therefore we naturally find that the development of the modern form of these bodies of law is, to a large extent, an eighteenth-century development.

At this point I propose to deal with the following branches of what may be called the common law of the constitution: The servants of the Crown; the right to personal liberty; the right to liberty of discussion; the right to petition; the right of public meeting; and the power of the state to suppress riots and rebellions.

The Servants of the Crown

It is in the eighteenth century that we can see the beginnings of our modern constitutional law upon the following three allied topics, which centre round the servants of the Crown: (1) the relation of the servants of the Crown to the public; (2) the relation of the servants of the Crown to one another; and (3) the relation of the servants of the Crown to the Crown. The main principles of the law which underlie all these topics are derived from the common law—from the law of tort, from the law of master and servant, and from the law of agency. But these doctrines of the common law have been modified in their application to these different relationships of the servants of the Crown, by three different sets of considerations: first, by the fact that their employer, the Crown, can do no wrong and is therefore immune from action; secondly, by the fact that the remedies against the Crown, which the law has provided, are very limited in their scope; and, thirdly, by the introduction of rules and doctrines based on public policy. As the result of these three different sets of considerations, the common law doctrines which govern these relationships of the servants of the Crown, have been so modified that they have developed into

[1] Vol. iii 388; below 705 713. [2] Vol. iii 388.

a perfectly distinct and a not wholly satisfactory branch of constitutional law.

(1) *The relation of the servants of the Crown to the public.*

In dealing with this subject we must begin by distinguishing between the spheres of tort and contract.

Tort.—We have seen that the rule that the servants of the Crown are personally responsible to the law for wrongs committed by them in their official capacity, was the view held by the Parliamentary lawyers in the first half of the seventeenth century ; [1] and that it was a well-established rule in the second half of that century.[2] It was in fact a logical deduction from two leading principles of constitutional law—first the principle that the King can do no wrong,[3] and, secondly, the principle of the supremacy of the law.[4] The classical exposition of this rule, and of the principles upon which it has been based ever since the seventeenth century, is contained in Cockburn, C.J.'s judgment in the case of *Feather v. The Queen*.[5] It was held in that case that no petition of right would lie for a tort authorized by the Crown ; for, since no tort can be imputed to the Crown, the Crown cannot in law be supposed to have authorized it. But it was pointed out that the apparent injustice to the subject was cured by the principle that, for such torts, the servants of the Crown were personally answerable. The Chief Justice said : [6]

> Apart altogether from the question of procedure, a petition of right in respect of a wrong, in the legal sense of the term, shows no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs ; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign. For, from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong ; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorized it to be done. . . . Let it not, however, be supposed that a subject sustaining a legal wrong at the hands of a minister of the Crown is without a remedy. As the Sovereign cannot authorize wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown. . . . The case of the General Warrants,[7] *Money v. Leach* (3 Burr. 1742), and the cases of *Sutton v. Johnstone, in Error* (1 T.R. 493), and *Sutherland v. Murray* (1 T.R. 538) there cited, are direct authorities that an action will lie for a tortious act notwithstanding it may have had the sanction of the highest authority in the

[1] Vol. vi 101-103, 111, 267. [2] Hale, P.C. i 43-44, cited vol. iii 466 n. 4
[3] For the origins of this principle see vol. iii 464-466 ; vol. iv 202-203 ; vol. ix 4-6.
[4] Above 649. [5] (1865) 6 B. and S. 257.
[6] At pp. 295-297. [7] Below 659 seqq.

state. But in our opinion no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown—a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to up-hold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other.

Contract.—The making of a contract is an act which the Crown can authorize its servants to do; and therefore the making of a contract by a servant of the Crown on behalf of the Crown, and in accordance with the Crown's instructions, exposes the servant to no liability. This rule is based partly upon the general rules of the law of agency,[1] and partly on public policy.

The rule itself and the reasons on which it is based were for the first time clearly enunciated in 1786 in the case of *Macbeath v. Haldimand*.[2] The facts of that case were as follows: The defendant was the governor of Quebec. The plaintiff had supplied goods for the use of the fort of Michilimakinac. Bills for the price of these goods were drawn by the governor of the fort on the defendant and endorsed by the plaintiff. The defendant alleged that some of the plaintiff's charges were exorbitant, and therefore he refused to accept the bills; but he paid the plaintiff what he considered to be due to him. The plaintiff brought this action for the balance. Buller, J., directed a verdict for the defendant, and the case came before the court of King's Bench on a motion for a rule ordering a new trial. The court held that no action lay, and refused the motion for a new trial. Lord Mansfield, C.J., based his judgment on the fact that the defendant had contracted as agent for the Government—a fact which was proved by the act of the plaintiff in debiting the amounts charged to the Government.[3] It followed therefore that on ordinary principles of the law of agency the defendant was not liable. He could only be liable if he had personally contracted to be liable; and there was no evidence of this.[4] Lord Mansfield cited in support of this principle two cases in which, in similar circumstances, it was held that a person contracting on behalf of the

[1] See Halsbury's Laws of England (2nd ed.) i 298 n. (*u*).

[2] 1 T.R. 172; the question seems to have been raised in 1690 in the case of Graham v. Stamper 2 Vern. 146; the defendant in this suit had recovered against the plaintiff, the Master of the Buckhounds, in an action of indebitatus assumpsit for goods sold and delivered; the plaintiff then took proceedings in Chancery for relief on the ground that the debt was the King's, and the defendant was ordered to answer the bill; it is clear that the principles applicable to this question were not then settled.

[3] "In the present case it was notorious that the defendant did not personally contract; the plaintiff knew, at the time that he furnished the stores, that they were for the use of Government; and he afterwards made the Government debtor in his bills," at p. 180.

[4] Ibid.

Government was not liable.[1] Ashhurst, J., based his judgment partly on this ground and partly on the ground of public policy, which, he said, might modify the rules applicable to private agreements.[2] He held that, even if the case were treated as a mere private agreement, there was no ground for making the defendant liable, since he had contracted as agent for the Government. But he emphasized the impolicy of holding a defendant liable in such cases.

> Great inconveniences would result from considering a governor or commander as personally responsible in such cases as the present. For no man would accept of any office of trust under Government upon such conditions. And indeed it has frequently been determined that no individual is answerable for any engagements which he enters into on their behalf.[3]

But suppose that a servant of the Crown contracted as agent for the Crown without having in fact any authority so to contract. If he contracted knowing that he had no authority so to contract, it is clear that he would be guilty of the tort of deceit; the rules applicable to torts committed by servants of the Crown would apply; and the servant would be personally liable. But, suppose that he honestly but erroneously supposed that he had the Crown's authority, can he be made liable on an implied warranty of authority? It was held in the case of *Dunn v. Macdonald*[4] that he could not. That was a case of a contract of employment for a period of three years. The decision was partly based on the narrow ground that the defendant had authority to employ the plaintiff, and that his dismissal before the period of three years had elapsed gave rise to no cause of action, because it is a rule of law that all servants of the Crown hold office at the pleasure of the Crown, unless there is a statutory provision for a different tenure of their office. But it was also based on the principle that, on grounds of public policy, public agents are not to be made personally liable, even if, in a similar case, a private agent would be liable. Lopes, L.J., said:[5]

> The liabilities of public agents on contracts made by them in their public capacity are on a different footing from the liabilities of ordinary

[1] "In a late case which was tried before me, when one Savage brought an action against Lord North, as first Lord of the Treasury, in order that he might be reimbursed the expenses which he had incurred in raising a regiment for the service of Government, I held that the action did not lie. So in another case of *Lutterloh* against *Halsey*, which was an action brought against the defendant, who was a commissary, for the supply of forage for the Army, and by whom the plaintiff had been employed in that service, the commissary was held not liable," 1 T.R. 180.

[2] "In great questions of policy we cannot argue from the nature of private agreements," ibid at p. 181.

[3] At pp. 181-182; for the modern cases which lay down the same law see *Palmer v. Hutchinson* (1881) 6 A.C. 619; Halsbury's Laws of England (2nd ed.) i 298 n. (*a*).

[4] [1897] 1 Q.B. 401; S.C. on appeal ibid 555.

[5] At p. 557.

agents on their contracts. In the former case, unless there is something special which would be evidence of an intention to be personally liable, an agent acting on behalf of a government is not liable for breach of a contract made in his public capacity, even though he would by the terms of the contract be bound if it were an agency of a private nature.

Whether the liability of an agent on an implied warranty of authority is a contractual liability, arising from an implied term in the contract of agency;[1] or whether, on the other hand, it is a common law liability of a non-tortious kind, similar to the liability imposed on masters for the torts of their servants when acting within the scope of their employment; it must be regarded as an extension of the public agent's immunity from contractual or common law liability, justifiable only on those grounds of public policy which the courts have always been inclined to stress—sometimes, as we shall see,[2] unduly.

In fact this broad ground of public policy has led the courts to lay down the broad rule that, whenever a servant of the Crown is commissioned by the Crown to do a lawful act, the manner in which he does it can afford no ground of action to a person aggrieved thereby. This was the principle laid down in 1822 in the case of *Gidley v. Lord Palmerston.*[3] In that case it was held that a retired clerk of the War Office, to whom a pension was payable, could not sue the Secretary at War for his pension, although the Secretary at War had received the amount of the pension.[4] The decision was based partly on the ground that in such cases the money is voted to the Crown, and that the defendant's duty in respect of it was a duty to the Crown only, and not to the plaintiff, so that there was no duty owed to the plaintiff by the defendant from which the law could imply a promise to pay him.[5] It was also based on that wider ground of public policy, which had been emphasized by Ashhurst, J., in the case of *Macbeath v. Haldimand.* Dallas, C.J., said:[6]

An action will not lie against a public agent for anything done by him in his public character or employment, although alleged to be in the particular instance a breach of such employment.

This principle was based on the ground of public policy. If such actions were allowed, persons in a public position would be exposed to a multiplicity of actions—a risk which "would prevent any proper or prudent person from accepting a public

[1] This seems to be the view taken in the leading case of Collen v. Wright (1857) 8 E. and B. at pp. 657-658; cp. Winfield, The Province of the Law of Tort 177.

[2] Below 657-658.

[3] 3 Brod. and B. 275.

[4] The payment to the clerk had been suspended, and the money had been applied to liquidating claims which certain halfpay officers and widows had against the clerk by reason of the fact that he had acted as their agent.

[5] 3 Brod. and B. at p. 285.

[6] Ibid at p. 286.

situation." [1] This principle has been acted upon by the courts in many subsequent cases, in which it has been sought to make servants of the Crown liable to the public for acts not amounting to torts against the plaintiff, which have been done in the course of their official duty.[2]

We shall now see that this combination of common law principles and the principle of public policy, is equally apparent in the rules which regulate the relation of the servants of the Crown to one another, and in the consequences of those rules.

(2) *The relation of the servants of the Crown to one another.*

We have seen that the case of *Lane v. Cotton* [3] laid down the principle that the relation of master and servant does not exist as between the head of a department of government and his subordinates.[4] Both the head of the department and his subordinates are servants of the Crown. We have seen also that, as the result of this principle, the head of a department cannot be made liable for the torts of his subordinates. There can be no doubt about the technical correctness of the reasoning upon which this conclusion is based; and we have seen that it was based not only upon the technical reason that the relation of master and servant does not exist between the head of a department and his subordinates, but also upon the ground of public policy—it would be unreasonable to expose the head of a department to so extensive a liability.[5] This decision was followed by the court of King's Bench in 1778 in the case of *Whitfield v. Lord le Despencer*.[6] Lord Mansfield treated the decision in the case of *Lane v. Cotton* as decisive,[7] and further justified it by a consideration of the provisions of the Act of 1662 which regulated the Post Office.[8]

Both these decisions can be justified on the technical ground that the head of a department and his subordinates do not stand in the relation of master and servant, and also on grounds of public policy. The undoubted injustice which they have caused is due to the fact that, in such cases, no remedy can be had against their employer, the Crown.[9] We have seen that this fact is due to the mistaken view that the master's liability

[1] 3 Brod. and B. at p. 287.

[2] Dickson v. Viscount Combermere (1863) 3 F. and F. at p. 585 *per* Cockburn C.J.; Grant v. The Secretary of State for India (1877) 2 C.P.D. at pp. 453-454; Kinloch v. The Secretary of State for India (1882) 7 A.C. 619.

[3] (1701) 1 Ld. Raym. 646. [4] Vol. vi 267-268. [5] Ibid 267 n. 8.

[6] 2 Cowp. 754. [7] Ibid at p. 766.

[8] Ibid at p. 765; for modern cases which lay down the same principle see Raleigh v. Goschen [1898] 1 Ch. 73; Bainbridge v. Postmaster-General [1906] 1 K.B. 178.

[9] Vol. ix 44.

is in such cases a delictual liability, so that it cannot be enforced by a petition of right.[1] It is in fact a common law duty imposed on masters ; and since a petition of right lies to enforce a statutory duty,[2] there is no reason why it should not lie to enforce a common law duty. We have seen that the private citizen has no remedy against a public servant who makes an innocent misrepresentation as to the extent of his authority to contract, because his liability is not a liability in tort.[3] On the other hand, the private citizen is deprived of any remedy against the Crown for the torts of its servants, because the courts have ruled that a liability, which is no more tortious in its nature than the agent's liability on an implied warranty of authority, is a liability in tort.

(3) *The relation of the servants of the Crown to the Crown.*

There can be no doubt that, apart from those mediæval offices which were of a proprietary nature,[4] and apart from offices (like those of the judges) which by statute are held on a special tenure,[5] the Crown has the power to dismiss any of its servants at will.[6] But suppose that the Crown, or its servants acting on its behalf, make a contract with a person that his employment as a servant of the Crown shall last for a fixed period, and suppose that he is dismissed for no fault of his own before that period has elapsed—can he sue the Crown by petition of right ? This question was not raised till the end of the nineteenth century,[7] probably because it was not definitely settled before 1874 that a petition of right would lie for breach of contract.[8] When it was raised, it was held in a series of cases that no petition of right would lie, because it is a rule of law founded on public policy that, whatever may be the contract between the Crown and its servants, the Crown has the right to dismiss its servants at its pleasure.[9] The cases show that this rule applies to persons in the naval, military, and civil service of the Crown ; [10] and to the servants of the Crown in the

[1] Vol. ix 43. [2] Ibid 43-44. [3] Above 653-654.
[4] Vol. i 247-248 ; above 501. [5] Vol. i 195 ; above 415.
[6] Below n. 9. [7] Dunn v. The Queen [1896] 1 Q.B. 116.
[8] Thomas v. The Queen L.R. 10 Q.B. 31 ; vol. ix 39, 41.
[9] " I take it that persons employed as the petitioner was in the service of the Crown, except in cases where there is some statutory provision for a higher tenure of office, are ordinarily engaged on the understanding that they hold their employment at the pleasure of the Crown. So I think there must be imported into the contract for the employment of the petitioner the term which is applicable to civil servants in general, namely, that the Crown may put an end to the employment at its pleasure. . . . It seems to me that it is the public interest which has led to the term which I have mentioned being imported into contracts for employment in the service of the Crown," Dunn v. The Queen [1896] 1 Q.B. at pp. 119-120 *per* Lord Herschell.
[10] Grant v. The Secretary of State for India (1877) 2 C.P.D. at p. 453 ; Mitchell v. The Queen (1890) [1896] 1 Q.B. 121 n. 2.

colonies and dominions as well as to servants of the Crown in Great Britain.[1]

When the common law was called upon to settle these various relations of the servants of the Crown to the public, to one another, and to the Crown, it was set a very difficult task. Its rules must protect the public from oppression, and at the same time they must not fetter unduly the free action of the executive government. They must not be out of harmony with the common law principles of the law of tort and contract; for it was quite clear after 1640 that there could be no administrative law in England,[2] and that therefore the status of these servants of the Crown must be regulated in accordance with the principles of the common law. On the other hand, the Crown was prerogative; there were many rules of the common law, both adjective and substantive, which made it necessary to modify the principles of the common law when they came to be applied to the Crown;[3] and, apart from these rules, public policy demanded that some modification should be made. The courts in the eighteenth and nineteenth centuries have, with some help from the Legislature, balanced these different considerations not unskilfully, and with a fair amount of success. Their insistence upon the personal liability of the servants of the Crown for their torts gave a notable security against oppression. The reform of the procedure upon a petition of right by the Petitions of Right Act of 1860,[4] and the decisions of the courts in the nineteenth and twentieth centuries that a petition of right lies for breach of contract[5] and for the breach of a statutory duty,[6] gave the subject a further security against the commission of dishonest and illegal acts by the servants of the Crown. The principal mistake made by the courts was the denial to the subject of any remedy against the Crown for the tortious acts of its servants. On the other hand, their insistence on the immunity of servants of the Crown for non-tortious acts done by them in their public capacity, and on the power of the Crown to dismiss its servants at its will, gave the executive considerable freedom of action.

Until these last days the balance between the Crown and the subject has been not unfairly maintained. But the decision of Rowlatt, J., in 1921 that the Crown "cannot by contract hamper its freedom of action in matters which concern the

[1] Shenton v. Smith [1895] A.C. 229.
[2] Vol. i 516; vol. vi 112, 162, 215-216, 234.
[3] Vol. ix 7-8.
[4] 23, 24 Victoria c. 34.
[5] Thomas v. The Queen (1874) L.R. 10 Q.B. 31.
[6] Attorney-General v. De Keyser's Royal Hotel [1920] A.C. 506.

welfare of the State," [1] seems to swing the balance too much in favour of the Crown. No cases either in the argument or the judgment were cited in favour of this wide principle. The rule that the Crown can dismiss its servants at its will, and that it cannot fetter its power so to do, is no doubt an analogy; but it is a slender foundation for so large a super-structure; and the admission that the principle does not apply to commercial contracts shows that its ambit is very vague.[2] No doubt the principle laid down by Rowlatt, J., harmonizes with the tendency of that series of modern statutes, which exempts public officials from the necessity, to which all other subjects of the King are liable, of submitting the legality of their actions to the arbitrament of the law. But that very fact creates a presumption that it is opposed to the common law principles underlying those parts of our constitutional law, which define the rights and liberties of the subject as against the Crown. This will be apparent when we have examined some of these principles. To that examination we must now turn.

The Right to Personal Liberty

In the preceding volume of this History I have related the history of the manner in which the courts and the Legislature united to make the writ of *Habeas Corpus* the most effectual protector of the liberty of the subject that any legal system has ever devised.[3] In no branch of constitutional law were the results of the alliance between Parliament and the common law more fruitful; for we have seen that both in this century and later the courts were always ready so to interpret the rules of the common and statute law relating to this writ, that they made for its greater efficiency.[4] This attitude of the courts reflected a deep-seated popular feeling in favour of liberty, to which Blackstone gave expression when he said that "the spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or negro, the very moment he lands in England falls under the protection of the laws, and so far becomes a freeman, though the master's right to his service may *possibly* still continue." [5]

[1] Rederiaktiebolaget Amphitrite v. The King [1921] 3 K.B. at p. 503.
[2] Ibid; cp. L.Q.R. xlv 166.
[3] Vol. ix 108-122. [4] Ibid 119-122, 122-124.
[5] Comm. i 127; in the first edition the sentence ran "and with regard to all natural rights becomes *eo instanti* a free man"; and in the third edition the word "probably" was used instead of possibly; the meaning of this qualification was explained ibid i 424-425; vol. xi 247 n. 1; see Fiddes, Lord Mansfield and the Sommersett Case, L.Q.R. l 506-507; Mr. Fiddes, ibid 503, gives an account of an action for the forcible seizure of a negro tried by Lord Mansfield in which the bias of the jury in favour of liberty was marked; in Scotland the court of Session, in

But something more yet remained to be done to safeguard completely the right to personal liberty. The writ of *Habeas Corpus* provided a machinery by which a person arrested without good legal reason could obtain his release, by which a person entitled to be released on bail could assert his right to be bailed, and by which a person arrested for a good legal reason could obtain a speedy trial.[1] But the law which centred round the writ of *Habeas Corpus* did not define the cases in which arrest was legal. On this question, it is true, the common law had already evolved some very specific rules, disregard of which exposed those who contravened them to an action for false imprisonment. The powers of private persons and of constables to arrest felons or those suspected of felony, the power of constables to arrest those who in their presence committed a breach of the peace, the power of justices of the peace to issue warrants to arrest persons suspected of felony or of other crimes over which they had jurisdiction, were precisely defined ;[2] and these warrants must describe with certainty the person who was to be arrested.[3] The particularity of these rules seemed to be sufficient to protect the citizen from the danger of unlawful arrest. But the proceedings which arose out of the publication of no. 45 of the *North Briton* showed that there were still uncertainties in the law, of which the officials of the central government were prepared to take advantage. As the result of these proceedings the courts gave a definition of the powers of these officials to arrest, which added an important safeguard to the right to personal liberty.

The four principal cases which arose out of the publication of no. 45 of the *North Briton* were *Wilkes v. Wood*,[4] heard in Michaelmas Term 1763 ; *Leach v. Money, Watson, and Blackmore*,[5] heard in Easter Term 1765 ; *Entick v. Carrington*,[6] heard in Michaelmas Term 1765 ; and *Wilkes v. Lord Halifax*,[7] heard in Michaelmas Term 1769. In the case of *Wilkes v. Wood* Wilkes brought an action of trespass in the court of Common Pleas against Wood, a secretary of Lord Halifax, the secretary of state, to recover damages for entering his house and seizing his papers. The defendant justified under a warrant issued by the secretary of state to arrest the authors, printers, and publishers of no. 45 of the *North Briton*. The court of Common Pleas directed the

the case of Joseph Knight, gave a similar decision ; but there were four dissentient judges, see Boswell, Life of Johnson (7th ed. 1811) iii 421-423.

[1] Vol. ix 118-119. [2] Vol. iii 599-604.

[3] Hale says, 1 P.C. 580, " a general warrant upon complaint of a robbery to apprehend all persons suspected, and to bring them before etc. was ruled void, and false imprisonment lies against him that takes a man upon such a warrant, P. 24 *Car.* I upon evidence in a case of Justice *Swallow's* warrant before Justice *Roll*" ; cp. Hawkins, P.C. Bk. II c. 13 § 10 ; Bl. Comm. iv 291.

[4] 19 S.T. 1153. [5] Ibid 1001. [6] Ibid 1029. [7] Ibid 1406.

jury that such a warrant was illegal, and Wilkes was awarded £1,000 damages. In the case of *Leach v. Money, Watson, and Blackmore* the plaintiff brought an action of trespass in the court of Common Pleas against the three defendants, who were King's messengers, for breaking and entering his house and imprisoning him. The defendants pleaded as their justification a warrant issued by the secretary of state to search for and arrest the authors, printers, and publishers of no. 45 of the *North Briton*. The jury found for the plaintiff and awarded him £400 damages. The case was brought before the court of King's Bench on a bill of exceptions. The counsel for the Crown maintained, first, that a secretary of state has the powers of a justice of the peace and the procedural advantages given to justices by statutes of 1619,[1] 1623,[2] and 1751;[3] secondly, that the King's messengers were constables, and so had the powers of constables and the procedural privileges given to them by the statutes of 1623 and 1751; thirdly, that the warrant was legal; and fourthly, that the plaintiff's action was barred because he had not complied with the requirements laid down by the Act of 1751 for actions against justices. The case was argued twice. After the first argument Lord Mansfield and the whole court gave a clear opinion that general warrants were illegal. After a second argument, the judgment of the court of Common Pleas was affirmed, but on the narrow ground that the plaintiff arrested under the warrant was neither author, printer, nor publisher. In the case of *Entick v. Carrington* the plaintiff brought an action of trespass in the court of Common Pleas against the defendant a King's messenger, and three other messengers, for breaking and entering his house and carrying off his papers. The defendants pleaded as their justification a warrant issued by the secretary of state which directed them to arrest the plaintiff and to seize his books and papers. The jury found a special verdict, and concluded by saying that, if the court found the defendants guilty of the trespass complained of, they assessed the damages at £300. After argument on the special verdict, Lord Camden gave a long judgment in which he proved the illegality of a warrant to search for and seize the papers of a person accused of publishing a seditious libel. The hearing of the action of trespass brought by Wilkes against Lord Halifax for the arrest of the plaintiff and seizure of his papers, was long delayed by the use which the defendant made of his privileges as a peer.[4] But it was eventually heard, and, after a most able and impartial summing up by Wilmot, C.J., the jury awarded Wilkes, £4000 damages—a sum which was "so much less than the friends of

[1] 7 James I c. 5.
[2] 21 James I c. 12.
[3] 24 George II c. 44.
[4] Walpole, Memoirs of George III ii 110.

the plaintiff expected, and so little to the satisfaction of the populace, that the jurymen were obliged to withdraw privately for fear of being insulted." [1]

The three important constitutional questions which these cases raised were, first, the extent of the power to arrest possessed by a secretary of state; secondly, the validity of a general warrant; and, thirdly, the validity of a warrant to seize the papers of a person accused of publishing a seditious libel.

(1) The question of the extent of the power to arrest possessed by a secretary of state was a most important question, because the secretary of state was, as we have seen,[2] the officer of the Crown through whom the executive government most usually made its authority felt over the ordinary citizen. There is no doubt that, in practice, the secretary of state had, in the seventeenth and eighteenth centuries, assumed large powers to issue warrants to arrest persons suspected of treasons, felonies, and misdemeanours, and to search for and seize their papers. But was there any legal justification for this practice? The Crown sought to justify it on four grounds, first, on the ground that the secretary of state as a privy councillor had a power to arrest; secondly, on the ground that, as a justice of the peace or as a conservator of the peace, he had this power; thirdly, on the ground of long-continued practice which had in fact been recognized as legal by the courts; and, fourthly, on the ground that such a power was necessary for the safety of the state.

The first ground of justification raised two questions. First, what were the powers of the Privy Council as a whole to issue warrants to arrest. Secondly, what were the powers of individual privy councillors to issue these warrants. First, it was clear that the Privy Council as a whole had wide powers to arrest. The Statute of Westminster I had set out four cases in which persons arrested were not replevisable.[3] One of these cases was an arrest by the command of the King. Staunforde had interpreted this to mean an arrest by the King or his Council because "it was incorporated with him and spoke with his mouth." [4] This interpretation had been accepted by Lambard,[5] by the judges in 1591,[6] by Coke in 1621,[7] and by the counsel for the Seven Bishops in 1688.[8] Secondly, it was laid down by the judges in 1591 that an individual privy councillor

[1] 19 S.T. 1407. [2] Above 494. [3] 3 Edward I c. 15.

[4] "Et quatenus a commandemant le Roy, cest entendu de commandement de son bouche demesme, ou de son counsel quel est incorporate a luy et partout oue le bouche le roy mesme," Pleas of the Crown f. 72*b*; cp. Entick v. Carrington (1765) 19 S.T. at pp. 1052-1053.

[5] Eirenarcha, Bk. III c. 2 p. 345 (ed. 1619).

[6] 1 And. 297-298, cited vol. v 496-497.

[7] Notestein, Commons Debates 1621 iv 308.

[8] 12 S.T. at p. 216, cited below 662 n. 6.

could issue a warrant to arrest in cases of high treason.[1] There was no doubt about this. What was doubtful was the power of an individual privy councillor to issue a warrant of arrest in any other case. It was argued that an individual privy councillor had this power, first, on the ground that the court in *Howel's Case* in 1588 assumed that he had it;[2] and, secondly, on the ground that Holt, C.J., in *Rex v. Kendal and Row*,[3] had held that he had it in other cases besides cases of high treason.[4] In order to reinforce this conclusion, the theory was put forward that a privy councillor had the powers of arrest which the law gave to conservators or justices of the peace. This theory had emerged in the latter part of the seventeenth century;[5] and it had been put forward in the case of *The Seven Bishops*. But it had met with little favour in that case.[6] It was obvious that the privy councillors who had signed the warrant in that case had not signed it as justices of the peace; and it was assumed that the warrant signed by thirteen privy councillors would have been bad, if it had not been possible to presume that it was the warrant of the Council as a whole.[7] In these circumstances not much stress was laid on this argument. In fact its chief importance consisted in the fact that it suggested the second ground upon which the powers of the secretary of state were based.

The second ground of justification was a variant of the theory that a privy councillor had the powers of arrest which the law gave to conservators or justices of the peace. It was contended that the secretary of state, *virtute officii*, was invested

[1] 1 And. 297-298, cited vol. v 496-497; cp. Entick v. Carrington (1765) 19 S.T. at p. 1058, cited below 665.

[2] (1588) 1 Leo. 71.

[3] This case is reported in 1 Salk. 347; 1 Ld. Raym. 65; 5 Mod. 78; Skin. 596.

[4] "It [the resolution in Anderson's Reports] is so general, that persons committed for the least offence by any of the Privy Council shall not be dischargeable, which seems to be a breach of the fundamentals of the common law, which support the liberty of the subject. Sed non allocatur. For by Holt, Chief Justice, this point was looked upon to be so clear law, that it was never drawn in question in his memory, but once by Sir Francis Winnington at the Bar. And 1 Anders. 297 is good authority, for it was resolved at the meeting of the Judges for asserting the liberty of the subject," 1 Ld. Raym. at p. 65.

[5] This theory emerges in Kelyng at p. 19—"they all agreed that such a confession upon examination before a privy councillor, *tho' he be not a justice of peace*, is a confession within the meaning of the statute"; this looks as if there was an idea that a privy councillor, though he was not a justice of the peace, had the powers of a justice; but as Lord Camden pointed out in Entick v. Carrington (1765) 19 S.T. at p. 1053 the discussion really turned upon the proper interpretation to be put on the statute 5, 6 Edward VI c. 11 § 10.

[6] "*Pollexfen*, 'We do all pretty well agree (for aught I can perceive) in these two things, we do not deny but the council board has power to commit; they on the other side do not affirm that the lords of the council cannot [? can] commit out of council.' *Att. Gen.*, 'Yes, they may, as justices of the peace.' *Pollexfen*, 'This is not pretended to be so here.' *L.C.J.* 'No, no, that is not the case,'" 12 S.T. at p. 216.

[7] Ibid at pp. 217-218; cp. Entick v. Carrington (1765) 19 S.T. at p. 1057.

with all the powers of a conservator or a justice of the peace, and therefore had a right to issue warrants to arrest for all species of crimes.[1] In support of this contention it was said, quite untruly,[2] that the secretary of state's office was an ancient office "coeval with the Crown itself"; [3] and it was assumed, equally untruly, that conservators and justices of the peace were also primæval. It followed that, just as conservators and justices of the peace had at common law certain powers of arrest as incident to their office, so, *a fortiori*, must so great an official as the secretary of state; [4] and that therefore statutes giving procedural advantages to justices of the peace must be applicable to the secretary of state.[5] It was pointed out that older cases had assumed that the secretary of state had this power; [6] and it was said that this assumption was easily explained by this theory that the secretary of state had the powers of a conservator or a justice of the peace.[7] The objection that the secretary of state was not a justice of the peace, and could not therefore claim the powers or procedural privileges of a justice was overruled in 1694; [8] and in 1696 the contention that the secretary of state had the powers of a conservator or justice of the peace was accepted by Holt, C.J., and by Rokeby, J., in the case of *Rex v. Kendal and Row*. "Why," said Holt, C.J.,[9] "should not a secretary of state have power by law to make commitments? Pray what authority has a justice of the peace to commit in cases of high treason? It is not given to him by any statute; and truly I cannot tell from whence he derives such an authority, unless it be a virtue of the old common law, which does authorize conservators of the peace to commit in such cases." "Certainly," said Rokeby, J.,[10] "a conservator of

[1] "The question is—who were meant in that Act of Parliament [7 James I c. 5] by justices of the peace. Some persons were, from ancient times, so by office; some are so by special commission; some, by corporation charters; some, by tenure; some, by prescription. In the time of Edward III other persons were authorized to act within particular districts. But the great officers of state had the jurisdiction as incident to their offices. So had in some degree coroners and other inferior officers," Leach v. Money (1765) 19 S.T. at p. 1013 *per* De Grey S.G. *arg.*

[2] Above 493-494; below 665 and n. 7.

[3] Leach v. Money (1765) 19 S.T. at p. 1013. [4] Ibid.

[5] Ibid at p. 1017—"Acts of Parliament shall be taken with latitude, and extended to cases within the same reason, and calling for the same remedy."

[6] Howel's Case (1588) 1 Leo. 70; Hellyard's Case (1587) 2 Leo. 175; Yaxley's Case (1694) Skin. 369.

[7] Entick v. Carrington (1765) 19 S.T. at pp. 1039-1040.

[8] Yaxley's Case (1694) Carth. 291.

[9] 5 Mod. at p. 80; S.C. 1 Salk. 347 Holt C.J. is reported as saying, "That secretaries of state might commit as conservators of the peace did at common law; and that it was incident to the office, as it is to offices of justices of peace, who are not authorized by any express words in their commission to that purpose, but do it *ratione officii*"; cp. 1 Ld. Raym. at p. 66.

[10] 5 Mod. at p. 85; as to this argument Lord Camden said in Entick v. Carrington (1765) 19 S.T. at pp. 1047-1048, that no doubt a power to examine upon

the peace at common law might have committed, and to administer an oath is incident to his office; so that I take it a secretary of state is in nature of a conservator of the peace, and may as well commit now, as the other could at common law."

Thirdly, this view of the law was justified on the ground of long-continued practice. There is no doubt that, throughout the seventeenth century, arrests on warrants by secretaries of state had been common. Holt, C.J., said that only once had he known the legality of a commitment by a secretary of state questioned since he had been Chief Justice;[1] and that "for all his time commitments by them have been greatly regarded in the courts."[2] Indeed, the existence, from the time of the Revolution, of the practice of seizing the papers of those accused of publishing a seditious libel was found as a fact by the jury in the case of *Entick v. Carrington.*[3] Therefore, both in the case of *Leach v. Money*[4] and in the case of *Entick v. Carrington*[5] much reliance was placed upon the practice of secretaries of state—a practice which had been either expressly allowed or assumed to be good law by the courts.

Fourthly, it was justified on the ground of public policy. Rokeby, J., in *Rex v. Kendal and Row* had said that "the commitment by the secretary is good for he is a centinel who watches as for the publick good";[6] and this argument was repeated in the case of *Leach v. Money*. "A secretary of state," said De Grey the solicitor-general,[7] "is a centinel for the public peace: it is his duty to prevent the violation of it, and to bring the offender to justice; and it is necessary that he should be invested with this power, in order to enable him to execute this his duty."

There is no doubt that the judgment of the court in *Rex v. Kendal and Row* was supposed by most lawyers, in the early part of the eighteenth century, to have given legal sanction to the wide powers of arrest in fact exercised by secretaries of state. In 1709,[8] in 1722,[9] and in 1733[10] cases of persons

oath was an incident to the power to commit; but that the secretary of state had no power to examine upon oath; therefore "Mr. Justice Rokeby and myself, though we agree in principle, form our conclusions in a very different manner. He from the assumed power of committing, which ought first to have been proved, infers the incidental powers of administering an oath. I on the contrary, from the admitted incapacity to do the latter, am strongly inclined to deny the former."

[1] Rex v. Kendal and Row (1696) 1 Ld. Raym. at p. 65, cited above 662 n. 4.
[2] S.C. Skin. at p. 598.
[3] (1765) 19 S.T. at p. 1035; above 515.
[4] (1765) 19 S.T. at p. 1018.
[5] Ibid at pp. 1039, 1044.
[6] Skin. at p. 599.
[7] 19 S.T. at p. 1013.
[8] R. v. Derby, cited 19 S.T. at pp. 1014-1015.
[9] The King v. Earbury 8 Mod. 177.
[10] The King v. Dr. Earbury 2 Barnard 293, 346; at p. 346 it was argued that a warrant to seize a person's papers was illegal; but Lord Hardwicke C.J. held that this question did not arise, and refused to express an opinion upon it; in 19 S.T. at p. 1016 there is a wrong reference to this case—the reference there given being to the King v. Earbury cited in the preceding note.

committed for the crime of libel on a secretary of state's warrant were before the court: and in all of them the court assumed that the secretary of state had power to arrest in such cases. When, in 1716, Hawkins stated that "it is certain that the Privy Council or any one or two of them or a secretary of state may lawfully commit persons for treason, and for other offences against the state, as in all ages they have done," [1] he was stating a view of the law which then and later, was very generally held, and was backed by very considerable authority.

But, though the array of authority was imposing, it rested in reality on some very dubious propositions. How dubious they were was not recognized till they were submitted by Lord Camden to a searching analysis in his judgment in *Entick v. Carrington*. In that judgment he proved that the four grounds put forward to justify the wide powers of arrest claimed by the Secretary of State were baseless.

First, he showed that, though there was authority for the proposition that the Privy Council as a whole had wide powers to arrest, there was no authority for the proposition that an individual privy councillor could arrest in any case except a case of high treason. No authority for a wider power to arrest could fairly be extracted from the opinion of the judges in 1591, which is set out in Anderson's Reports; and though in *Howel's Case* [2] it seems to be assumed that a privy councillor has power to arrest, that case leaves the extent of the power wholly undefined.[3] "The two cases in Leonard do presuppose some power in a privy councillor to commit, without saying what; and the case in Anderson does plainly recognize such a power in high treason: but with respect to his jurisdiction in other offences I do not find it either claimed or exercised." [4] Moreover, the case of *The Seven Bishops* showed that the individual privy councillor could not claim that, in his capacity as a justice or a conservator of the peace, he had wider powers. In fact this claim was entirely baseless.[5]

Secondly, he showed that the secretary of state could not *virtute officii* claim to possess the powers of arrest belonging to conservators or justices of the peace.[6] The importance of the office of secretary of state was very recent.[7] Down to Charles I's

[1] Pleas of the Crown, Bk. II c. 16 § 4. [2] (1588) 1 Leo. 71.
[3] Entick v. Carrington (1765) 19 S.T. at pp. 1052-1058.
[4] Ibid at p. 1058. [5] Ibid at p. 1057; above 662 n. 6.
[6] Entick v. Carrington (1765) 19 S.T. at pp. 1046-1052.
[7] Ibid at pp. 1046-1047; Lord Camden, after pointing out that he was originally the King's private secretary, very truly says, "it is not difficult to account for the growth of this minister's importance. He became naturally significant from the time that all the courts in Europe began to admit resident ambassadors; for upon the establishment of this new policy, that whole foreign correspondence passed through the secretary's hands, who by this means grew to be an instructed and

reign he had "never exercised the power of committing in his own right."[1] He acted, either by virtue of an express authority from the King when he made commitments *per speciale mandatum regis*, or by virtue of his position as a privy councillor.[2] But commitments *per speciale mandatum regis* were condemned by the Petition of Right; and we have seen that there is no authority for the proposition that a privy councillor could commit in any other case except that of high treason.[3] On these grounds Lord Camden dissented from Holt, C.J.'s dictum in *Rex v. Kendal and Row* "if it shall be taken to extend beyond the case of high treason"[4]—which it clearly did.[5] Nor could the secretary of state base his powers upon the possession of the powers of a conservator or a justice of the peace, so that he could not bring himself within the statutes of 1609 and 1751, which related to actions against justices of the peace.[6] Sir Bartholomew Shower, in *Rex v. Kendal and Row*, had argued that the secretary of state was neither a conservator nor a justice of the peace, and, consequently, did not possess their powers;[7] but his argument had been overruled. Dunning had presented the same argument in the case of *Leach v. Money;*[8] but that case had been decided upon another ground.[9] Lord Camden held, in effect, that these arguments were correct. He proved that neither as justices nor as conservators were they included in the Acts which regulated proceedings against the justices.[10] As Dunning said, "the offices are different in creation, constitution, and execution. The very language of the warrant shows that the secretary of state did not consider himself as a justice, conservator, or constable."[11] The result was that the argument for the secretary of state's large powers to arrest, based on his possession of the powers of a justice or conservator of the peace, fell to the ground. Moreover, the same reasoning applied to the argument that their messengers, by whom their warrants were executed, had the

confidential minister. This being the true description of his employment, I see no part of it that requires the authority of a magistrate"; see vol. iv 66-67; above .

[1] Entick v. Carrington (1765) 19 S.T. at p. 1049.

[2] Ibid at pp. 1049-1051.

[3] Above 665.

[4] 19 S.T. at p. 1058; in R. v. Despard (1798) 7 T.R. at pp. 742-743 Lord Kenyon C.J. held, following R. v. Kendal and Row, that a secretary of state could commit for treasonable practices.

[5] The opinion of Holt C.J. was only dictum since the commitment in that case was for high treason; on the other hand the cases of R. v. Derby and R. v. Earbury were not overruled, 19 S.T. at pp. 1058-1059; it is obvious that the decision in the first case, 19 S.T. 1014-1016, is inconsistent with the decision in Entick v. Carrington, since the commitment in that case was for a libel; but the decision in the second case is not, as the commitment in that case was for writing a treasonable paper.

[6] 19 S.T. at pp. 1059-1062.

[7] (1696) 5 Mod. at p. 78.

[8] 19 S.T. at pp. 1021-1022.

[9] Above 660.

[10] 19 S.T. at pp. 1059-1062.

[11] Ibid at p. 1021.

powers of, and the statutory protection given to, constables. They, as Bartholomew Shower [1] and Dunning [2] had argued, and as Lord Camden proved,[3] had neither these powers nor this protection.

Lord Camden dealt with the third and fourth grounds upon which the powers of the secretary of state to arrest had been justified—practice and public policy—in that part of his judgment in which he discussed the question of the validity of a warrant to seize the papers of a person accused of publishing a seditious libel. I shall give an account of his argument on these two grounds of justification when I deal with his treatment of that topic.[4]

Lord Camden's judgment on the first and second of the grounds upon which it was sought to justify the wide powers of arrest claimed by the secretary of state, finally demonstrated the baselessness of these claims. It settled that the only power to arrest which he possessed was a power, as privy councillor,[5] to arrest in cases of high treason. In all other cases he must act through the instrumentality of judicial officers, who were obliged to observe the formalities which the common law, enacted and unenacted, had devised to protect the liberty of the subject. It is hardly going too far to say that, from this point of view, the constitutional effect of Lord Camden's judgment is comparable to the effect of the Act which abolished the court of Star Chamber and the jurisdiction of the Privy Council in England, and to the effect of the Habeas Corpus Act of 1679. Its effect is comparable to the effect of those Acts, because, in all cases, except the case of high treason, it prevented arrests from being made at the discretion of the executive, and so gave abundant security that, if an arrest was made, it could only be made by regular judicial officers acting in accordance with known rules of law.

(2) The question of the validity of a general warrant was a much plainer question. Though the solicitor-general, in the case of *Leach v. Money*, tried to maintain that its issue could be justified by usage,[6] it was quite impossible to maintain that argument in the face of Hale's clear statement that a general warrant was illegal.[7] In this case Lord Mansfield and the whole court of King's Bench held that they were illegal; and,

[1] 5 Mod. at p. 79.
[2] 19 S.T. at p. 1022.
[3] Ibid at p. 1062.
[4] Below 668-670.
[5] R. v. Despard (1798) 7 T.R. at pp. 742-743 seems to recognize that a secretary of state *virtute officii* had this power; but, since he was always a privy councillor, this distinction is of no practical importance.
[6] 19 S.T. at p. 1018; in fact, though the right to issue these warrants had been disputed in the courts, considerable use had been made of them, Thomson, Secretaries of State 1681-1782 116-117, 117-118.
[7] Above 659 n. 3.

although the case was actually decided on another point, Lord Mansfield's statement of the law has always been regarded as decisive. He said : [1]

At present—as to the validity of the warrant, upon the single objection of the uncertainty of the person, being neither named nor described—the common law, in many cases, gives authority to arrest without warrant ; more especially where taken in the very act : and there are many cases where particular Acts of Parliament have given authority to apprehend, under general warrants ; as in the case of writs of assistance, or warrants to take up loose idle and disorderly people. But here, it is not contended that the common law gave the officer authority to apprehend ; nor that there is any Act of Parliament which warrants this case. Therefore it must stand upon principles of common law. It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge ; and should give certain directions to the officer. This is so, upon reason and convenience. Then as to the authorities—Hale and all others hold such an uncertain warrant void : and there is no case or book to the contrary. It is said, ' that the usage has been so ; and that many such have issued, since the Revolution, down to this time.' But a usage, to grow into a law, ought to be a general usage, *communiter usitata et approbata ;* and which after a long continuance, it would be mischievous to overturn. This is only the usage of a particular office, and contrary to the usage of all other justices and conservators of the peace.

(3) The question whether the secretary of state had power to issue a warrant to seize the papers of a person accused of a seditious libel, was a question which had never been submitted to the test of a thorough judicial examination till it was argued in the case of *Entick v. Carrington.* The practice of issuing these warrants was a common practice in the secretary of state's office ever since the Restoration, and probably from a still earlier period.[2] The legality of the practice had been questioned in 1733 ; but the court gave no opinion upon this question,[3] and decided the case upon another ground. Lord Camden showed that the historical origin of the practice, so far from justifying it, condemned it ; that it was supported by very flimsy reasoning ; and that it was contrary to well-ascertained principles of the common law.

Lord Camden is probably right in thinking that the historical origin of the practice of issuing these warrants to seize papers is to be found in an enlargement, slight in appearance but large in its consequences, of the power given to the secretary of state

[1] Leach v. Money (1765) 19 S.T. at pp. 1026-1027.

[2] Ibid at p. 1025 the solicitor-general said, and no doubt correctly, "the bill of exceptions indeed only takes it up from the Revolution ; asserting that it has been so ever since that time : but the facts go up to the Restoration" ; in fact, as he said, the usage was probably "coeval with the office."

[3] "As to the other part of it, with regard to seizing the defendant's papers he would not give an opinion whether it was legal or not," R. v. Earbury (1733) 2 Barnard at p. 348 *per* Lord Hardwicke C.J.

by the Licensing Acts to issue search warrants to seize unlicensed and libellous publications.[1]

> I do very much suspect that the present warrant took its rise from these search warrants . . . ; nothing being easier to account for than this engraftment; the difference between them being no more than this, that the apprehension of the person in the first was to follow the seizure of papers, but the seizure of papers in the latter was to follow the apprehension of the person. The same evidence would serve equally for both purposes. . . . Only this material difference must always be observed between them, that the search warrant only carried off the criminal papers, whereas this seizes all.[2]

But, if the power of the secretary of state to issue these search warrants originated in this way, it disappeared with the lapsing of the Licensing Acts. It is clear, therefore, that if it originated in this way, both it, and *a fortiori*, the much larger power assumed by the secretary of state without any statutory warrant, stood decisively condemned.

The principal arguments for the legality of the practice were its long-continued existence—a fact which was, as we have seen, testified to by the verdict of the special jury;[3] the fact that its legality had never been questioned in a court of law; and the necessity for the existence of such a power in the interests of good government. In answer to the argument from long-continued existence, Lord Camden pointed out that a practice only proved to have existed since the Revolution was too modern to be able to make law;[4] that, even if it had been an ancient practice, it could not prevail against well-settled rules of the common law;[5] and that, in no circumstances, could the practice of a private office or of a particular person make law in a public matter.[6] In answer to the argument that the practice had never been questioned in a court, Lord Camden said:[7]

[1] See Thomson, Secretaries of State 1681-1782, 114-115.

[2] Entick v. Carrington (1765) 19 S.T. at p. 1070.

[3] Ibid at p. 1035; above 515.

[4] 19 S.T. at p. 1068.

[5] "To search seize and carry away all the papers of the subject upon the first warrant: that such a right should have existed from time whereof the memory of man runneth not to the contrary, and never yet have found a place in any book of law; is incredible. But if so strange a thing could be supposed, I do not see how we could declare the law upon such evidence," ibid.

[6] "This is the first instance I have met with, when the ancient immemorable law of the land, in a public matter, was attempted to be proved by the practice of a private office. The names and rights of public magistrates, their power and forms of proceeding as they are settled by law, have been long since written, and are to be found in books and records. Private customs indeed are still to be sought from private tradition. But who ever conceived a notion, that any part of the public law could be buried in the obscure practice of a particular person," ibid at p. 1068; it is significant of the gradual growth of the secretary of state's office that it could be spoken of by Lord Camden as a "private office," and that the secretary of state could be called a "particular person"; it is arguable that, in so speaking, Lord Camden put his case too high; it was quite sufficient for his argument to prove that the alleged practice was contrary to the rules of the common law.

[7] Ibid at p. 1068

I answer, there has been a submission of guilt and poverty to power and the terror of punishment. But it would be strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal law which a few criminal booksellers have been afraid to dispute.

In answer to the argument that the power was necessary in the interests of good government, Lord Camden said that that was a consideration for the Legislature ; [1] and then he went on to make his celebrated statement as to the worthlessness of that sort of argument in a court of common law :

And with respect to the argument from state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of such distinctions.[2]

The fact that this statement embodies the traditional attitude of the common law to the executive is an all sufficient reason why, in all ages, Englishmen have turned to the rules of the common law as their best protection against arbitrary government. Erskine, in his speech in defence of Thomas Paine, said : [3]

If I were to ask you, gentlemen of the jury, what is the choicest fruit which grows upon the tree of English liberty, you would answer security under the law. If I were to ask the whole people of England, the return they looked for at the hands of government, for the burdens under which they bend to support it, I should still be answered security under the law ; or, in other words, an impartial administration of justice.

Erskine's words were as true in past periods in the long history of English law as they were in the eighteenth century ; [4] and as true to-day as they have ever been in the past.

The mere statement of the extent of the power claimed by the Crown shewed that its existence was contrary to well-settled principles of the common law. Lord Camden thus described it : [5]

If honestly exerted, it is a power to seize that man's papers, who is charged upon oath to be the author or publisher of a seditious libel ; if oppressively, it acts against every man, who is so described in the warrant, though he be innocent. It is executed against the party, before he is heard or even summoned ; and the information, as well as the informers, is unknown. It is executed by messengers with or without a constable (for it can never be pretended that such is necessary in point of

[1] 19 S.T. at p. 1073. [2] Ibid.

[3] R. v. Thomas Paine (1792) 22 S.T. at p. 417.

[4] When in 1621 it was said that a person who resisted the patentee of a monopoly was arrested, not in virtue of the patent, " but for reason of State because they opposed government," Coke replied, " Doe you account monopolie a matter of State and his exercise of trade an opposition of government. . . . Men's properties cannot be bound by charter," Notestein, Commons Debates 1621 v 89-90.

[5] 19 S.T. at pp. 1064-1066.

law) in the presence or absence of the party, as the messengers shall think fit, and without a witness to testify what passes at the time of the transaction; so that when the papers are gone, as the only witnesses are the trespassers, the party injured is left without proof. If this injury falls upon an innocent person, he is as destitute of remedy as the guilty; and the whole transaction is so guarded against discovery, that if the officer should be disposed to carry off a bank bill, he may do it with impunity, since there is no man capable of proving either the taker or the thing taken. . . . Nor is there pretence to say, that the word 'papers' here mentioned ought in point of law to be restrained to the libellous papers only. The word is general, and there is nothing in the warrant to confine it; nay I am able to affirm, that it has been upon a late occasion executed in its utmost latitude: for in the case of Wilkes against Wood, when the messengers hesitated about taking all the manuscripts, and sent to the secretary of state for more express orders for that purpose, the answer was, 'That all must be taken manuscripts and all.' Accordingly, all was taken, and Mr. Wilkes's private pocket book filled up the mouth of the sack. . . . Such is the power, and therefore one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant.

But so far was the law from giving a clear warrant for its existence, that as Lord Camden demonstrated, no warrant at all could be found for it in the books.[1]

The decisions upon these three questions were an effective safeguard of the liberty of the subject; and their effectiveness was increased by the decision of the court in the case of *Huckle v. Money*[2] and other cases,[3] that, when the liberty of the subject had been infringed, the court would not interfere with the assessment of damages by the jury. In the case of *Huckle v. Money*, Lord Camden said:[4]

The small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary powers, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages.

Therefore although the plaintiff was only detained six hours, and was, during that period, entertained with beef steaks and beer, the court refused to disturb the verdict of £300 damages.

The restrictions placed by this series of decisions upon the power of the executive to interfere with the liberty of the subject,

[1] 19 S.T. at pp. 1066-1068. [2] (1763) 2 Wils. 205.
[3] Beardmore v. Carrington (1764) 2 Wils. 244; Beardmore v. Halifax (1765) Sayer on Damages 228.
[4] At pp. 206-207.

put the finishing touch to the elaborate mechanism of rules and remedies designed to secure personal liberty, which the common law and the Legislature had, from an early period in the history of the common law, been constantly engaged in constructing and elaborating.[1] Since the second of the principles laid down in these decisions—the illegality of general warrants—was obvious, it was the final ascertainment of the first and third of these principles—the limitation of the power of a secretary of state to arrest, and the invalidity of a warrant to seize the papers of a person accused of publishing a seditious libel—which was the main addition which these decisions made to the law.[2] Though the other judges gave their assistance and assent, it is chiefly due to Lord Camden that this finishing touch was given by the final ascertainment of these two principles. His judgment in the case of *Entick v. Carrington* is a masterly performance—remarkable both for the breadth and insight of its historical learning, and for its mastery of the principles of the common law. It shews that he was a great constitutional lawyer, a great legal historian, and a great common lawyer—a worthy successor, by virtue both of his learning and his principles, of such predecessors as Coke and Hale and Holt. He continued their work of so adjusting the claims of the Crown and the subject that both the authority of the state and the liberty of the subject were preserved—their work of basing the powers of the state and the rights of the subject on the firm ground of deductions from those principles of the common law which, from the mediæval period, the courts had been stating and elaborating by means of their decisions in concrete cases.

We shall now see that, just as Lord Camden, by his applications of the principles of the common law, consolidated the right of the subject to personal liberty, so he helped to put on its modern foundations the right of the subject to liberty of discussion.

The Right to Liberty of Discussion

Erskine, in his defence of Thomas Paine, stated very clearly the truth, emphasized by Stephen in his *History of the Criminal Law*,[3] that the extent of the right to liberty of discussion depends upon the view which is taken of the relation of rulers to their subjects. He said :[4]

[1] Vol. ix 104-125.

[2] These principles were accepted as settled in the case of Sayre v. the Earl of Rochford (1776) 20 S.T. 1285, which was finally decided against the plaintiff, who had made an improper use of the *replication de injuria sua propria* (vol. ix 292-293, 310-311), see the report in 2 W.Bl. 1165 ; cp. Thomson, Secretaries of State 1681-1782 125-126.

[3] H.C.L. ii 299-300, cited vol. viii 338.

[4] R. v. Paine (1792) 22 S.T. at p. 437.

I have insisted at great length on the origin of governments . . . because I consider it to be not only an essential support, but the very foundation of the liberty of the press. . . . If the people have, without possible recall, delegated all their authorities, they have no jurisdiction to act, and therefore none to think or write upon such subjects; and it would be a libel to arraign government or any of its acts, before those who have no jurisdiction to correct them. But . . . no legal argument can shake the freedom of the press in my sense of it, if I am supported in my doctrines concerning the great unalienable right of the people to reform or change their governments. It is because the liberty of the press resolves itself into this great issue, that it has been in every country the last liberty which subjects have been able to wrest from power. Other liberties are held *under* government, but the liberty of opinion keeps governments themselves in due subjection to their duties.

Erskine's view of the relation of rulers to their subjects, and, consequently, his view as to the extent of the right of subjects to criticize their rulers, were the accepted views in England in the eighteenth century;[1] for they were the logical consequence of the Revolution settlement. But we have seen that the law of libel which, after the refusal of Parliament in 1694 to renew the Licensing Act,[2] was the sole controller of the liberty of the press,[3] had been formed in the period when it was considered that all authority had been delegated to the ruler, and consequently that any comment on his actions was libellous.[4] It followed that, as the eighteenth century progressed, the law of libel restricted liberty of discussion in a way which was quite inconsistent with prevalent political ideas and prevalent public opinion.

This situation naturally produced a demand for a restatement or a change in the law. This demand grew more insistent in the latter part of the century, because George III's attempt at personal rule gave rise to bitter criticism of the policy of the government and to projects of reform. It was obvious that the law, as settled in the latter part of the seventeenth century, did not allow sufficient scope for legitimate criticism and legitimate political discussion. It was realized that, if the functions of the jury in a prosecution for libel were enlarged, if they had the right to pronounce not only upon the fact of publication and the truth of the innuendoes, but also upon the question whether a document published with the meaning alleged by the prosecution was in law a libel; if, in other words, they had the right to give a general verdict upon the whole matter; there would be abundant security that the law would be so administered that it harmonized with the political ideas and the public opinion of the day. Consequently both in the important libel cases of the second half of

[1] Hume, Essays Moral, Political, and Literary (ed. 1875) i 94, says that "nothing is more apt to surprise a foreigner, than the extreme liberty, which we enjoy in this country, of communicating whatever we please to the public, and of openly censuring every measure, entered into by the king or his ministers."

[2] Vol. vi 375; vol. viii 341. [3] Vol. vi 377. [4] Vol. viii 341.

the century,[1] and in Parliament,[2] it was strenuously urged that the jury had the right to give a general verdict, and that the judges who ruled that its functions were restricted to the finding of the fact of publication and the truth of the innuendoes, were wrong.

A strong case could be made for this thesis, because in the case of libel, as in the case of maintenance and conspiracy, difficulties and anomalies had been created by the fact that, in the latter part of the seventeenth century, it had become necessary to adapt a crime, which had been developed in the Star Chamber, to the new technical setting of the common law and the common law courts.[3] The adaptation had been made; but in the substantive law which governed the crime of libel, as it emerged after this adaptation, there were uncertainties,[4] and in the procedural rules which governed trials for this offence there were anomalies.[5] Moreover, it is not surprising to find that the language of the judges, and even the decisions, in some of the cases decided during the period when this adaptation was being made, were sometimes ambiguous.[6] All these uncertainties, anomalies, and ambiguities were pressed into the service of the very able lawyers who argued that the jury had the right to return a general verdict.[7] But the majority of the judges rejected, and rightly rejected, their arguments. The current of authority was decisively in favour of rejection. On the other hand, it was clear that the law as laid down by the judges was quite out of harmony with the political ideas and public opinion of the time; and it was clear that an adoption of the view of those who held that the jury ought to have the right to return a general verdict, would harmonize the law with these ideas and this opinion. For these reasons the Legislature in 1792 declared that the jury had this right,[8] and, by so doing, put the right of liberty of discussion on its modern basis.

We have seen that, as early as 1731, claims that the jury had the right to give a general verdict were being put forward.[9] But the controversy did not become acute till the second half of the eighteenth century. The principal cases in which this contention was made and negatived by the judges are the following: In 1752 [10] Owen, a bookseller, was indicted for a libel on the House of Commons. Owen had published a pamphlet in which the House had been accused of making an unjust and oppressive use of its powers, when it committed Alexander Murray to prison for riotous conduct during the Westminster election. Charles

[1] Below 680-688. [2] Below 688. [3] Vol. viii 361, 392, 399.
[4] Below 682-683. [5] Below 683-684. [6] Below 686-688.
[7] Below 680 seqq. [8] 32 George III c. 60; below 690.
[9] R. v. Francklin 17 S.T. at p. 672, cited vol. viii 344-345.
[10] R. v. Owen 18 S.T. 1203; Stephen, H.C.L. ii 323.

Pratt, the future Lord Camden, one of Owen's counsel, argued that the jury ought not to find Owen guilty merely on proof of publication, unless they thought that he had a guilty intent.[1] The jury, contrary to the direction of the judge, acquitted Owen. In 1770 [2] Almon was tried on an information filed by the attorney-general for selling in his shop Junius's letter to the King. The accused was found guilty. In the same year Miller [3] and Woodfall [4] were tried for printing and publishing the same libel. In the case of Miller the jury acquitted. In the case of Woodfall it returned a verdict of printing and publishing only. The court held that it could not give judgment on this verdict, and that there must be a new trial.[5] No new trial was held; but Lord Mansfield was attacked in both Houses of Parliament for his direction to the jury in these cases.[6] He answered this attack by leaving with the clerk to the House of Lords a copy of his judgment in Woodfall's case.[7] But he very properly refused to answer a series of interrogatories which Lord Camden proposed to put to him on the legal propositions contained in the judgment.[8] A promise was extracted from him to fix a day for the discussion of the matter; and it must be admitted that he showed some want of moral courage in neglecting to fulfil this promise.[9] In 1777 [10] John Horne (better known by his later name of Horne Tooke) was indicted for libelling the King's troops in America by calling them murderers. He was found guilty, and judgment was given against him, which he made an unsuccessful attempt to induce the House of Lords to reverse by a writ of error. In 1783 [11] there occurred the most famous of all these cases—the case of W. D. Shipley, the Dean of St. Asaph. He was prosecuted for publishing a pamphlet entitled "A Dialogue between a Gentleman and a Farmer" which, it was alleged, incited to rebellion. The jury were told by the judge that all they were

[1] 18 S.T. at pp. 1227-1228.

[2] R. v. Almon 20 S.T. 803; Stephen, H.C.L. ii 324.

[3] 20 S.T. 870; Stephen, H.C.L. ii 324-325.

[4] 20 S.T. 895; Stephen, H.C.L. ii 324-325.

[5] 20 S.T. at p. 921.

[6] Parlt. Hist. xvi 1211 seqq. (House of Commons), 1313 seqq. (House of Lords); Stephen, H.C.L. ii 325-326.

[7] Parlt. Hist. xvi 1312-1313.

[8] See Stephen, H.C.L. ii 326; as Stephen says, "it would be wholly inconsistent with his duty as Lord Chief Justice to discuss in a Parliamentary debate the merits of a judgment given in the court of King's Bench; the proper way of calling in question the propriety of the law so laid down was by proceedings in error in a case admitting of such proceedings"; Stephen is right in saying that Mansfield showed want of presence of mind in not taking this objection—an objection which Holt C.J. had taken in R. v. Knollys, vol. vi 271; for the interrogatories see Parlt. Hist. xvi 1321.

[9] Ibid 1322; Stephen, H.C.L. ii 326.

[10] 20 S.T. 651; Stephen, H.C.L. ii 326-328.

[11] 21 S.T. 847; S.C. Sub nom. The King v. Shipley 4 Dougl. 73; Stephen, H.C.L. ii 330-343.

concerned with was the fact of publication and the truth of the innuendoes. On this direction they found a verdict of guilty of publishing only. This verdict was explained by the jury to mean " guilty of publishing the pamphlet," but " we don't decide upon its being a libel or not." [1] The verdict was entered in this way, and Erskine moved for a new trial on the ground of misdirection by the judge. It is his argument on this motion, and Lord Mansfield's decision upon it, which state most fully the opposing views of the law. The motion was refused; [2] but Erskine succeeded in another motion to arrest judgment on the ground that the words used were not libellous.[3] In 1789 [4] the House of Commons addressed the Crown to prosecute Stockdale for the publication of a pamphlet which, it was alleged, libelled the House by reflecting upon the manner in which it had conducted the impeachment of Warren Hastings. Accordingly the attorney-general filed an information against Stockdale. Stockdale was acquitted on the ground that the pamphlet referred, not to the House of Commons as a whole, but only to particular persons.

These were the principal cases in which the controversy as to the right of the jury to give a general verdict was fought out. It is therefore to these cases that we must look for the origins of our modern law as to the right to liberty of discussion. I shall deal with this controversy, in which our modern law originated, under the following heads: (1) The law as stated by Lord Mansfield and the other judges; [5] (2) The law as stated by Lord Camden, Erskine, and others who opposed the view of Lord Mansfield and the other judges; (3) The settlement of the law in 1792 by Fox's Libel Act; (4) The legal and constitutional results of this settlement.

(1) *The law as stated by Lord Mansfield and the other judges.*

The fullest statement of the law laid down by Lord Mansfield and the other judges is, as Stephen has pointed out,[6] contained

[1] 21 S.T. at p. 953. [2] Ibid at p. 1040.
[3] Ibid at p. 1044. [4] 22 S.T. 237; Stephen, H.C.L. ii 328-330.
[5] With the exception of Wills J. who supported the right of the jury to give a general verdict: for his judgment see R. v. Shipley 4 Dougl. at pp. 171-176; he said at p. 171, " in the first place I conceive it to be the law of this country, that the jury upon a plea of not guilty, or upon the general issue, upon an indictment or information for libel, have a constitutional right, if they think fit, to examine the innocence or criminality of the paper, notwithstanding there is sufficient proof given of the publication. Secondly, I conceive it to be law, that if upon such examination the jury should, contrary to the judge's direction, acquit the defendant generally, such a jury are not liable either to attaint, fine, or imprisonment; nor can this Court set aside the verdict of deliverance by a new trial, or by any other means whatsoever."
[6] H.C.L. ii 316.

in Lord Mansfield's judgment in *The Dean of St. Asaph's Case.*[1] The following is a summary of his argument:

Four objections are made to the direction of the judge. The first is that the judge did not leave the evidence of a lawful excuse or justification to the jury, as a ground upon which they might acquit, or as a matter for their consideration. This is an objection peculiar to this case. The answer to it is this: if such an excuse or justification is set up it raises two questions —the question whether the facts alleged by way of excuse or justification exist, which is a question of fact, and the question whether the facts so proved are an excuse or justification, which is a question of law. Here the evidence tendered to prove an excuse or justification really proved circumstances of aggravation. But such circumstances of aggravation, and also circumstances of alleviation, are not material evidence at the trial, because they cannot affect the issue whether the accused published a paper with the meaning alleged by the prosecution. They are only material if the accused is convicted, and the question arises what punishment is to be inflicted. Therefore the evidence here offered was rightly rejected.[2]

The second objection is, that the judge did not give his own opinion, whether the writing was a libel, or seditious, or criminal. The third, that the judge told the jury they ought to leave that question upon record to the Court, if they had no doubt of the meaning and publication. The fourth and last, that he did not leave the defendant's intent to the jury. The answer to these three objections is, that by the constitution the jury ought not to decide the question of law, whether such a writing, of such a meaning, published without a lawful excuse be criminal; and they cannot decide it *finally* against the defendant, because, after the verdict it remains open upon the record; therefore it is the duty of the judge to advise the jury to separate the question of fact from the question of law; and, as they ought not to decide the law, and the question remains entire upon the record, the judge is not called on necessarily to tell them his own opinion. It is almost peculiar to the form of a prosecution for libel, that the question of law remains entirely for the court *upon record*, and that the jury cannot decide it against the defendant; so that a general verdict 'that the defendant is guilty,' is equivalent to a special verdict in other cases. It finds all which belongs to a jury to find; it finds nothing as to the question of law. Therefore when a jury have been satisfied as to every fact within their province to find, they have been advised to find the defendant *guilty*, and in that shape they take the opinion of the Court upon the law. No case has been cited of a special verdict in a prosecution for a libel, leaving the question of law upon the record for the Court, though, to be sure, it might be left in that form; but the other is simpler and better. As to the last objection upon the *intent:* a criminal intent from doing a thing criminal in itself without a lawful excuse, is an inference of law,

[1] 21 S.T. at pp. 1033-1040; 4 Dougl. at pp. 162-171.

[2] 21 S.T. at pp. 1033-1034; with this part of the judgment Wills J. agreed, 4 Dougl. at p. 176.

and a conclusive inference of law, not to be contradicted but by an excuse, which I have fully gone through. Where an *innocent act* is made criminal, when done with a particular intent, there the intent is a *material fact* to constitute the crime. This is the answer that is given to these three last objections to the direction of the judge.[1]

Lord Mansfield pointed out that these three objections had been urged "upon every trial for a libel since the Revolution."[2] He then went through the history of the principal cases to show that the direction given by the judge in this case—the direction that the jury were concerned only with the fact of publication and the truth of the innuendoes—had been uniformly followed.[3] It had been followed by Holt, C.J., in *R. v. Tutchin*, by Lord Raymond, C.J., in *R. v. Francklin*, and by Lee, C.J., in *R. v. Owen*.[4]

In the year 1756 I came into the office I now hold. Upon the first prosecution for a libel which stood in my paper . . . I made up my mind as to the direction I ought to give. I have uniformly given the same in all, almost in the same form of words. No counsel ever complained of it to the court. Upon every defendant being brought up for judgment, I have always stated the direction I gave; and the court has always assented to it. The defence of a *lawful excuse* never existed in any case before me; therefore I have told the jury if they were satisfied with the evidence of the publication, and that the meaning of the innuendoes were as stated, they ought to find the defendant guilty; that the question of law was upon record for the judgment of the court. This direction being *as of course*, and no questions were raised concerning it in court (though I have had the misfortune to try many libels in very warm times, against defendants most obstinately and factiously defended), yet the direction being *as of course*, and no objection made, it passed as of course, and there are no notes of what passed. In the case of the King and Woodfall . . . there happens to be a report, and there the direction I have stated, is adopted by the whole court as right, and the doctrine of Mr. Justice Buller is laid down in express terms. Such a judicial practice in the precise point from the Revolution, as I think, down to the present day, is not to be shaken by arguments of general theory or popular declamation.[5]

[1] 21 S.T. at pp. 1034-1035. [2] Ibid.

[3] Lord Mansfield cited Pulteney's ballad to show that in 1731 even the popular readers did not claim the right now claimed for the jury; it runs as follows:

"For Sir Philip well knows,
That his innuendos
Will serve him no longer
In verse or in prose;
For twelve honest men have decided the cause
Who are judges of fact, though not judges of laws."

Erskine said that the last line really ran—

"Who are judges alike of the facts and the laws."

But, as the reporter in 4 Dougl. at p. 169 *note* says, Erskine's version "does not seem so consistent with the preceding lines of the ballad for innuendos are clearly in the province of the jury."

[4] Ibid at pp. 1036-1038. [5] 21 S.T. at pp. 1038-1039.

Well might Erskine say, in his argument in Thomas Paine's case in 1792, that Lord Mansfield had, in the Dean of St. Asaph's case treated him, "not with contempt, for of that his nature was incapable; but he put me aside with indulgence, as you do a child while he is lisping its prattle out of season." [1]

It followed, therefore, that the jury were generally confined to finding the fact of publication and the truth of the innuendoes. It was only if some matter of excuse or justification was put forward, e.g. if it was alleged that the paper had not in fact attacked the persons which it was alleged to attack, that the jury must also find as a fact whether or not the allegation of the prosecution, that it attacked those persons, was proved. It was on this ground that in *R. v. Stockdale* [2] the question whether the paper related, as the prosecution alleged, to the House of Commons, was left to the jury.[3] But, as Lord Mansfield pointed out in *The Dean of St. Asaph's Case*,[4] if allegations of this sort were made, their legal effect, supposing them true, was a question of law. The judge therefore ought to direct the jury as to their legal effect, and the jury ought to follow that direction in giving their verdict—"though by means of a general verdict they are intrusted with a power of blending law and fact, and following the prejudices of their affections or passions." [5] In cases, therefore, in which some such matter of excuse or justification was put forward, the jury's power was greater. As Stephen says, in the case of *R. v. Stockdale* "the result was the same as if the jury had considered the whole matter." [6]

Lord Mansfield was at some pains to show that the law as thus stated worked no injustice:

> Jealousy of leaving the law to the Court, as in other cases, so in the case of libels, is now, in the present state of things, puerile rant and declamation. The judges are totally independent of the ministers that may happen to be, and of the King himself. Their temptation is rather to the popularity of the day . . . the judgment of the Court is not final; in the last resort it may be reviewed in the House of Lords, where the opinion of all the judges is taken.[7]

In 1792, when Fox's Libel Act was being considered by the House of Lords, the House put seven questions to the judges.[8] The result of their answers was to affirm the views stated by Lord

[1] 22 S.T. at p. 437; the case was tried after the passing of Fox's Libel Act, and Erskine, very properly, used the Act to press the point that it was dangerous to condemn opinions even when backed by the highest authority; he said, "yet I have lived to see it resolved by an almost unanimous vote of the whole Parliament of England, that I had all along been right. If this be not an awful lesson concerning opinions, where are such lessons to be read?"

[2] (1789) 22 S.T. 237.

[3] Stephen, H.C.L. ii 327.

[4] 21 S.T. at p. 1033.

[5] Ibid.

[6] H.C.L. ii 329-330.

[7] 21 S.T. at p. 1040.

[8] For these questions and the answers of the judges see 22 S.T. 296-304.

Mansfield. At the same time they admitted that, if a judge chose to declare the law to the jury, and to "leave that declaration, together with the evidence of publication and the application of innuendoes to persons and things, to the jury," the direction of the judge could not be attacked.[1] But they said that this would not be an advisable course to pursue. Even if the innocence of the paper appeared to be "clearly manifest," though the judge might direct a verdict of acquittal, such a direction would not generally be expedient.

No case has occurred in which it would have been, in sound discretion, fit for a judge sitting at Nisi Prius, to have given such a direction or recommendation to a jury. It is a term in the question that the innocence shall be clearly manifest. This must be in the opinion of the judge. But the ablest judges have sometimes been decidedly of an opinion which has upon further investigation been discovered to be erroneous, and it is to be considered, that the effect of such a direction or recommendation would be, unnecessarily to exclude all further discussion of the matter of law in the court from which the record of Nisi Prius was sent, in courts of Error, and before your lordships in the dernier resort. Very clear indeed, therefore, ought to be the case in which such a direction or recommendation shall be given.[2]

The view of the law held by Lord Mansfield and the other judges was the historically correct view of the law.[3] But a strong technical case could be made against it; and it was out of harmony with the political ideas and the public opinion of the day. Most of the technical objections to it could be and were answered; but the substantial objection that it was out of harmony with the political conditions of the eighteenth century admitted of no answer. The weight of this substantial objection was so great that it introduced some confusion into the judges' statement of the law; for, as Stephen says, "the law was so harsh, indeed in reference to the state of things which even then existed so intolerable, that the judges did not state it nakedly and logically, but put it in a form which exposed them at particular points to arguments to which I see no answer."[4] For these reasons the law was changed in 1792.[5] With the history of the technical objections to the law, and with its change in 1792 I shall deal in the two following sections.

(2) *The law as stated by Lord Camden, Erskine, and others who opposed the views of Lord Mansfield and the other judges.*

Four main arguments were put forward by those who opposed the views of Lord Mansfield and the other judges. First,

[1] 22 S.T. at pp. 303-304. [2] Ibid at p. 299.

[3] "It appears to me that on the main question at issue . . . the judges were right and Erskine wrong, in reference to the law as it then stood," Stephen, H.C.L. ii 358.

[4] Ibid ii 358; below 686. [5] 32 George III c. 60.

it was said that in all crimes the criminal intent, the *mens rea*, was of the essence of the crime, and must be left to and found by the jury as a matter of fact. Secondly, it was said that, since the verdict of guilty or not guilty, which the judge directed the jury to give, was a general verdict, the jury must have the right, in the case of libel as in the case of other crimes, to decide the whole matter. Thirdly, it was said that, if the general verdict of guilty had only the limited meaning put upon it by the judges, it might cause considerable injustice. Fourthly, it was said that decisions and dicta of the judges favoured the view that the jury had this right to give a general verdict.

(i) It was said that in all crimes the criminal intent, the *mens rea*, was of the essence of the crime, and must be left to and found by the jury as a matter of fact. Lord Camden maintained this thesis throughout his life. When, as Mr. Pratt, he argued the case of *R. v. Owen*,[1] he said that, just as the intention must be found by the jury on an indictment for an assault with intent to kill or ravish, so it must be found on an information for publishing a libel maliciously.[2] The same view is implied in the questions which he addressed to Lord Mansfield in 1770;[3] and in the debate on Fox's Libel Bill, in what was almost his last speech in the House of Lords, he said:[4]

> What was the ruling principle? The intention of the party. Who were judges of the intention of the party; the judge? No; the jury. So that the jury were allowed to judge of the intention upon an indictment for murder, and not to judge of the intention of the party upon libel. This, indeed, was so much out of all principle of justice and common sense, that it could not be supported for a single moment.

Erskine said:[5]

> When a bill of indictment is found, or an information filed, charging any crime or misdemeanour known to the law of England, and the party accused puts himself upon the country by pleading the general issue—Not Guilty; the jury are *generally* charged with his deliverance from that *crime*, and not *specially* from the fact or facts, in the commission of which the indictment or information charges the crime to consist; much less from any single fact, to the exclusion of others charged upon the same record. Secondly, that no act, which the law in its general theory holds to be criminal, constitutes in itself a crime, abstracted from the mischievous intention of the actor; and that the intention, even when it becomes a simple inference of legal reason from a fact or facts established, may and ought to be collected by the jury, with the judge's assistance; because the act charged though established as a fact in a trial *on the general issue*, does not necessarily and unavoidably establish the criminal intention by any abstract conclusion of law.

[1] (1752) 18 S.T. 1203.
[2] At p. 1227.
[3] Parlt. Hist. xvi 1321.
[4] Ibid xxix 1406.
[5] 21 S.T. at pp. 972-973.

It follows therefore that

in all cases where the law either directs or permits a person accused to throw himself upon a jury for deliverance, by pleading *generally* that he is not guilty; the jury, thus legally applied to, may deliver him from the accusation by a general verdict of acquittal founded (as in common sense it evidently must be) upon an investigation as general and comprehensive as the charge itself from which it is a general deliverance.

This argument was used both in the courts [1] and in Parliament [2] by those who adopted this view of the law.

The force of this argument was derived from the rule, which had sprung up in the earlier part of the eighteenth century, that a malicious or seditious intent was an essential ingredient in the crime of libel; [3] and from the common form of indictments and informations, which charged the accused of stating false facts with all sorts of wicked intentions.[4] The answer given to this argument was two-fold. In the first place it was said that certain of these allegations were mere words of form, like the allegation in an indictment for murder that the accused was instigated by the devil.[5] In 1792 the judges said: [6]

If it be asked why the word *false* is to be found in indictments or informations for libel, we answer that we find it in the ancient forms of our legal proceedings, and therefore that it is retained; but that it hath, in all times, been the duty of judges, when they come to the proof to separate the substance of the crime from the formality with which it is attended, and too frequently loaded, and to confine the proof to substance. The epithet *false* is not applied to the propositions contained in the paper, but to the aggregate criminal result—Libel. We say *falsus libellus*, as we say *falsus proditor* in high treason. In point of substance, the alteration in the description of the offence would hardly be felt if the epithet were *verus* instead of *falsus*.[7]

[1] See Mr. Bootle's argument in R. v. Francklin (1731) 17 S.T. at p. 659, and Lord Raymond C.J.'s summing up ibid at pp. 674-675; and serjeant Glynn's argument in R. v. Almon (1770) 20 S.T. at pp. 831-835, and in R. v. Miller (1770) ibid at p. 881.

[2] Parlt. Hist. xvi 1213-1214 (serjeant Glynn); ibid 1263 (Townshend); ibid 1287 (Wedderburn).

[3] Vol. viii 372-373.

[4] Ibid 341-342.

[5] Thus Lord Mansfield said in R. v. Woodfall (1770) 20 S.T. at p. 901, "that as for the intention, the malice, sedition, or any other still harder words which might be given in informations for libels, whether public or private, they were mere formal words; mere words of course; mere inference of law, with which the jury were not to concern themselves; that they were words which signify nothing; just as when it is said in bills of indictment for murder 'instigated by the devil'"; in R. v. Almon he said, "if an author is at liberty to write, he writes at his peril, if he writes and publishes that which is contrary to law; and with the intention or view, with which a man writes or publishes, that is in his own breast. It is impossible to know what the views are, but from the act itself; if the act is such, as infers in point of law, a bad view, then the act itself proves the thing. And as to the terms 'malicious,' 'seditious' . . . they are all inferences of law arising out of the fact in case it be illegal. If it is a legal writing and a man has published it, notwithstanding these epithets, he is guilty in no shape at all," ibid at p. 836.

[6] 22 S.T. at p. 298.

[7] This was in agreement with Lord Mansfield's statement in R. v. Almon 20 S.T. at p. 837; he said, "Mr Serjeant Glynn told you what was true in libels

Thus, in an action for libel, the plaintiff is not put to prove the falsity of the document, but the defendant must, if he relies on this defence, prove its truth—a rule which shows that falsity is not the substance of the complaint. In the second place, it was, as we have seen,[1] said that the essence of libel was the publication of the paper without just cause of excuse. The publication was in itself a criminal act, so that the jury could find a person guilty on proof of the act. It was wholly different from an innocent act which is only criminal if done with a certain intent. Then the jury must find the intent. We have seen that there was much authority against this view as to the essence of libel in the eighteenth century;[2] but that in the nineteenth century it has been recognized to be the law.[3] So long as some sort of evil intent was thought to be of the essence of libel, there was considerable force in the arguments of Lord Camden and Erskine.

(ii) It was said that, since the verdict of guilty or not guilty, which the judge directed the jury to give, was a general verdict, the jury must have the right, in the case of libel as in the case of other crimes, to decide the whole matter. We have seen that Erskine dealt with this aspect of the question in his argument on the first point.[4] He further emphasized it later in his argument:[5]

> Not guilty universally and unavoidably involves a judgment of law, as well as fact; because the charge comprehends both, and the verdict . . . is coextensive with it. Both Coke and Littleton give this precise definition of a general verdict, for they both say, that if the jury *will* find the law, they may do it by a general verdict which is even as large as the issue. If this be so, it follows by necessary consequence, that if the judge means to direct the jury to find generally against a defendant he must leave to their consideration everything which goes to the constitution of such a general verdict, and is therefore bound to permit them to come to, and to direct them how to form, that general conclusion from the law and the fact, which is involved in the term *Guilty*. For it is ridiculous to say that guilty is a fact; it is a conclusion in law from a fact, and therefore can have no place in a special verdict, where the legal conclusion is left to the court.

To this Mansfield could only reply that "every species of criminal prosecution has something peculiar in the mode of procedure; therefore general propositions, applied to all, tend only to complicate and embarrass the question."[6] And he said that the peculiarity of a prosecution for libel was precisely this

formerly: they had more epithets of that kind, and, amongst the rest, they put in the word 'false'; but he is mistaken as to the time; it was left out many years ago; and the meaning of leaving this out is, that it is totally immaterial in point of proof, true or false"

[1] Above 677-678. [2] Vol. viii 373. [3] Ibid 374-375.
[4] Above 681-682. [5] 21 S.T. at p. 995. [6] 21 S.T. at p. 1039.

—that " the question of law remains entirely for the court *upon record* . . . so that a general verdict ' that the defendant is guilty,' is equivalent to a special verdict in other cases." [1] Since the question of law is thus clearly severed on the record from the question of fact, the jury cannot do anything else but find the facts; for the maxim " ad quaestionem juris non respondent juratores: ad quaestionem facti non respondent judices " is without exception.[2] A jury which attempts to usurp the function of the court by attempting to pass upon the law, when law and fact are thus clearly distinguished on the record, is as blameworthy as a judge who decides a case without hearing both the parties.[3] But it is clear that a rule which required what was really a special verdict to be expressed in the form of a general verdict of guilty, was, to say the least, misleading; [4] and, as we shall now see, it was argued that it might produce very serious injustice.

(iii) It was said that, if the general verdict of guilty only had the limited meaning put upon it by the judges, it might cause considerable injustice. On this point Erskine made two contentions, which were, I think, unsound; but there is another reason which gives considerable support to this argument.

His first contention was this: The whole case against the accused is not necessarily contained on the record, so that it is not true to say that the whole case remains on the record as a question of law for the court.

The crown may indict part of the publication, which may have a criminal construction when separated from the context, and the context omitted having no place in the indictment, the defendant can neither demur to it, nor arrest the judgment after a verdict of guilty; because the Court is absolutely circumscribed by what appears on the record, and the record contains a legal charge of a libel.[5]

The answer to this was, as Lord Mansfield pointed out,[6] that the context could in all cases be looked at. It is clear, as we have seen,[7] that the facts from which it was sought to prove an excuse or a justification could be determined by the jury. The jury, for instance, could find that the words did not relate to the person whom the accused was charged with defaming.[8] On the same

[1] 21 S.T. at p. 1035. [2] Ibid at p. 1039. [3] Ibid.

[4] " The judges tried to make the verdict of guilty in trials for libel an imperfect special verdict, which would have the effect of convicting the defendant, even if he was innocent in the opinion of the judge who tried him, subject to his getting the court to quash his conviction upon a motion in arrest of judgment," Stephen, H.C.L. ii 358.

[5] 21 S.T. at p. 1001. [6] Ibid at pp. 1002, 1003. [7] Above 679.

[8] In R. v. Stockdale (1789) 22 S.T. at pp. 292-293 Lord Kenyon C.J. said, " in applying the innuendoes, I accede entirely to what was laid down by the counsel for the defendant, and which was admitted yesterday by the attorney-general, as counsel for the crown, that you must, upon this information, make up your minds,

principle they could find that the prosecution had failed to prove that the words, when read with their context, bore the defamatory meaning alleged. Thus, to take Erskine's illustration, suppose a man were indicted for publishing a blasphemous libel, and the libel was alleged to consist in the statement "There is no God"; it would be open to the accused to prove that the words set out formed part of the text "The fool hath said in his heart there is no God." In such a case a verdict of not guilty would not contain any judgment on the question whether the words contained in the indictment were blasphemous. It would only find as a fact that the words, with their context, did not bear the blasphemous meaning alleged by the prosecution.

His second contention was this: Suppose an indictment for high treason, and suppose that, to prove an overt act of treason, the prosecution put forward the publication of a document, if the law as laid down by Lord Mansfield was correct, the whole effect of the paper would be withdrawn from the jury. They would be directed to find a verdict of guilty on mere proof of the publication of the document; the treasonable intent would be matter of law for the court only; so that the accused would lose the safeguard of trial by jury in the most serious capital case known to the law.[1] So important an argument did Erskine consider this that he said, "I will rest my whole argument upon the analogy between these two cases, and give up every objection to the doctrine when applied to the one, if upon the strictest examination, it shall not be found to apply equally to the other."[2] It was this contention which led the House of Lords in 1792 to include a question upon this matter, among the other questions as to the law of libel, which it addressed to the judges. The answer of the judges shows the fallacy of Erskine's contention. No doubt the construction of such a letter was matter of law for the court; but in such case the letter, as construed by the court, was simply evidence of an overt act of high treason. The jury must apply that evidence, and determine whether it proves some act which amounts to high treason. In other words, if a document is produced to prove an overt act of high treason, the publication of the document is not, as it is in the case of libel, the subject-matter of the charge: it is merely evidence of quite a different charge—a charge of high treason. The jury, under a proper direction as to the meaning of the

that this was meant as an aspersion upon *The House of Commons*, and I admit also, that, in forming your opinion, you are not bound to confine your enquiry to those detached passages which the attorney-general has selected as offensive matter, and the subject of prosecution"; in R. v. Horne (1777) 20 S.T. at pp. 770 Lord Mansfield admitted evidence to prove that the libel related to the King's troops; see Stephen, H.C.L. ii 327.

[1] 21 S.T. at p. 1005. [2] Ibid.

document, must be left to give a general verdict as to whether the charge of high treason is proved.[1]

But, though these contentions were fallacious, it is true that the law as laid down by the judges might inflict considerable hardship upon an innocent person. We have seen that in 1792 the judges had said that it was only in the clearest cases that the judges ought to direct an acquittal, on the ground that the matter published was not defamatory.[2] The result was that, as in the case of the Dean of St. Asaph, an accused person, against whom a verdict of guilty had been recorded, might be put to much expense in establishing the innocence of the paper;[3] and if he could not find bail, he might even be imprisoned during that period.[4] It is obvious that if, under a proper direction from the judge, a jury could have found him not guilty, all this expense and injustice would have been saved. It is true, as Lord Mansfield said, that the law supplied abundant safeguards against the punishment of an innocent man;[5] but it cannot be denied that the process for establishing innocence was inordinately lengthy and expensive.

(iv) It was said the decisions and dicta of the judges favoured the view that the jury had this right to give a general verdict.[6] It cannot be denied that there was an element of truth in this contention. It was obvious that the whole question of libel or no libel had been left to the jury in *The Case of the Seven Bishops*. The jury had not been confined to finding merely the fact of publication and the meaning of the paper.[7] In the case of *R. v. Tutchin*,[8] Holt, C.J., had used expressions which could be taken to mean that the seditious intention, with which the writing was composed, was a matter to be decided by the jury.[9] On all trials for libel the counsel for the Crown were in the habit of

[1] 22 S.T. at pp. 302-303.

[2] Above 680.

[3] "He was convicted, held to bail, and put to all manner of expense, trouble, and anxiety for having published a paper which the judge who tried him did not regard as criminal, instead of having the benefit of a declaration of the judge's opinion, which would have been equivalent to a direction to the jury to acquit," Stephen, H.C.L. ii 358.

[4] The court had ordered the dean to be committed pending the motion for a new trial, saying that they had no discretion to allow him to be at large after conviction, without consent. On this, Bearcroft, counsel for the Crown, at once consented that he should remain at liberty on bail; Erskine was therefore quite correct when he said that it was "only by the indulgence of counsel for the prosecution that the defendant is not at this moment in prison," 21 S.T. at p. 987; 4 Dougl. at p. 125-126 and *note*.

[5] Above 679.

[6] The best statement of this view is to be found in the dissenting judgment of Wills J. 4 Dougl. at pp. 174-175, and in Erskine's argument on the motion for a new trial, 21 S.T. at pp. 1012-1018.

[7] Vol. viii 344.

[8] (1704) 14 S.T. 1095.

[9] "Now you are to consider whether these words I have read to you do not tend to beget an ill opinion of the administration of the government," ibid at p. 1128, cited vol. viii 344 n. 5.

expatiating to the jury upon the seditious and other unlawful intentions with which the writings had been published; and the judges, even Lord Mansfield himself, were in the habit, in their directions to the jury, of emphasizing the wicked character and tendency of the writing.[1] The cases showed, as Lord Mansfield himself admitted, that an accused person might prove matters of excuse or justification.[2] He might show that, though the paper was a libel, it did not defame those whom he was accused of defaming. This, Erskine contended, proved "that the publication of a libel is not *in itself* a crime, unless the intent be criminal,"[3] so that the intent, being an essential element in the crime, must be left to the jury.

We have seen that this last argument, though it misled Lord Campbell,[4] was fallacious.[5] These matters of excuse or justification did not go to the intent, they merely went to disprove the charge made by the prosecution that A had published a libel on B. To admit proof that the paper, though a libel, did not libel B, or that the paper libelled nobody, because, when looked at with its context, it did not bear the defamatory meaning alleged by the prosecution, did not disprove the thesis that, if A published without just cause or excuse a document relating to B, with the meaning alleged by the prosecution, the libellous character of the document was matter of law for the court. But there is no doubt that both *The Case of the Seven Bishops*, and some of Holt, C.J.'s expressions in *R. v. Tutchin* did favour Erskine's view. The answer is, as we have seen, that, historically *The Case of the Seven Bishops* was decided in such extraordinary circumstances that, as the counsel for the Crown argued,[6] and as Stephen has said,[7] it cannot be regarded as an authoritative precedent for any legal doctrine; and that, if the judgment of Holt, C.J., in *R. v. Tutchin* is looked at as a whole, it tends to bear out the contention of Lord Mansfield rather than that of Erskine.[8] As to the argument based upon the fact that both counsel for the Crown and the judges enlarged upon the wicked character and tendency of the writings, the true answer was given by Lord Mansfield. He said:[9]

[1] See Erskine's argument on this point 21 S.T. at pp. 1011-1012; in R. v. Horne (1777) 20 S.T. at p. 762 Lord Mansfield used expressions from which it might be argued that the seditious intent was a fact which the jury must find.

[2] Above 678, 679. [3] 21 S.T. at p. 1017.

[4] Stephen, H.C.L. ii 329-330. [5] Above 679.

[6] "The case of *The Seven Bishops* is a single instance to the contrary; for there the question of libel or no libel was left to the jury, and they found a verdict of not guilty contrary to the opinion delivered by the majority of the Court. That verdict contributed so much to the freedom of the constitution, that it is difficult to speak of it but with reverence; but it is anomalous and cannot stand as an authority against the uniform current of prior and subsequent cases," 4 Dougl. at p. 100. [7] H.C.L. ii 315, cited vol. viii 344. [8] Vol. viii 344.

[9] 21 S.T. at pp. 1035-1036.

The counsel for the Crown, to remove the prejudices of a jury, and to satisfy the bystanders, have expatiated upon the enormity of the libels; judges, with the same view, have sometimes done the same thing; both have done it wisely with another view—to obviate the captivating harangues of the defendant's counsel to the jury, tending to show that they can or ought to find that in law the paper is no libel.

The decisions and dicta cited by Erskine showed that the judges had not always expressed themselves quite clearly or quite logically.[1] They showed, as was naturally to be expected, that they had not anticipated all the difficulties in, and the objections to, the principles which they were expounding—difficulties and objections which had been raised and developed with enormous ability and eloquence, as the result of the prosecutions of the last half of the eighteenth century. But, as Lord Mansfield pointed out, these decisions and dicta had made no impression on judicial practice during that century.[2] It is true that the law which had resulted was not so just or so convenient as Lord Mansfield contended that it was.[3] But that this was the law can hardly be denied. It was because this was the law that it began to be realized that the law was so ill suited to the political ideas and public opinion of the day, that a change in it must be made.

(3) *The settlement of the law in* 1792 *by Fox's Libel Act.*

In a debate in the House of Commons, which took place in 1770,[4] on serjeant Glynn's motion for a committee to enquire into the administration of criminal justice, and the proceedings of the judges in Westminster Hall, particularly in cases relating to the liberty of the press, and the constitutional power and duty of juries, the whole case for and against the view of the judges was reargued. Much the same arguments were used in the House of Commons as had been used in the courts. Thus, much stress was laid upon the argument that, since the addresses of counsel and the directions of judges to the jury often stressed the false, seditious, and scandalous character of the paper, these matters must be matters upon which the jury could decide;[5] and Dunning stressed *The Case of the Seven Bishops*, and tried to prove that the doctrines laid down by the judges originated "in the arbitrary times and under the arbitrary judges" of Charles II and James II's reigns.[6] But a large number of members of the House of Commons saw that the precedents were on the side of the judges, and that the obvious remedy was to change the law. Burke, for instance, pointed out that

[1] Stephen, H.C.L. ii 358; above 684 n. 4.
[2] Above 678.
[3] Above 686.
[4] Parlt. Hist. xvi 1211 seqq.
[5] Ibid 1251-1252, 1258.
[6] Ibid 1276-1279.

the opinion of Lord Raymond, C.J., in *R. v. Francklin* was decisive, and that that opinion was no innovation introduced by Lord Raymond, C.J., but "a legacy from still greater judges, and among the rest, from the very bulwark of the Revolution, Lord Holt." [1]

Burke advocated a change in the law.[2] With this view Wedderburn agreed. He pointed out that, as matters stood, it was impossible to enforce the law.

> Juries thinking their laws and liberties to be at stake, and judges imagining their honour and authority as well as the law and the constitution to be concerned, neither will give up the contest, till the land become one scene of anarchy and misrule. Indeed, who does not see that this is already the case? The most audacious libellers cannot be convicted. Secure in the opposition of juries they laugh at all the terrors of information and attachment. The attorney-general with all his power is despised.[3]

As Burke said in the following year, the controversy had come to be "not difference in opinion upon law but a trial of spirit between parties," with the result that "our courts of law are no longer the temple of justice, but the amphitheatre for gladiators." [4] Wedderburn then went on to give reasons, very similar to those afterwards given by Erskine,[5] for thinking that juries were the best tribunal to decide the question of libel or no libel. That question, he said,[6] was really and essentially a matter of fact. At bottom

> it depends solely on the opinion which is entertained of the libel by the public. What passed in the Roman Senate for polite raillery, would in this House be deemed a gross affront, and be perhaps attended with bloodshed. . . . So changeable is the nature of a libel, so much does it assume the cameleon, and suit its colour to the complexion of the times! In short its libellous quality is founded entirely on popular opinion. There is no other standard by which it can be measured or ascertained. Who then so proper as the people to determine the point?

In 1771 Dowdeswell moved for leave to introduce a bill to give juries the right to give a general verdict.[7] The motion was supported by Burke in a very able speech, in which he pointed out that the effect of the law laid down by the judges was to stifle all free discussion on the conduct of the government—a result which "even those who are most offended with the licentiousness of the press (and it is very exorbitant, very provoking) will hardly contend for." [8] The motion was lost; [9] but in 1791 Fox moved for leave to introduce a similar but more elaborate bill.[10] Pitt agreed that legislation was necessary,[11] and

[1] Parlt. Hist. xvi 1267.
[2] Ibid 1267-1269.
[3] Ibid 1288.
[4] Ibid xvii 53.
[5] Below 693-694.
[6] Parlt. Hist. xvi 1288-1289.
[7] Ibid xvii 43.
[8] Ibid 49.
[9] Ibid 58.
[10] Ibid xxix 551.
[11] Ibid 587.

the motion for leave to introduce the bill was carried unanimously.[1] The bill when introduced was also carried unanimously.[2] In the Lords it was opposed by Lord Chancellor Thurlow and Lord Kenyon and one or two other lords ;[3] and it was agreed that certain questions should be addressed to the judges on the law of libel and matters connected therewith. We have seen that the judges affirmed the correctness of the decisions of Lord Mansfield and the other judges.[4] The Lords resolved to send the bill to a committee by a majority of twenty-five.[5] In committee, Thurlow, having proposed an amendment which had been rejected, asked Lord Camden if he would accept an amendment, the effect of which would have been to allow the court to grant a new trial, if it was dissatisfied with the verdict of a jury for the defendant. "What," said Lord Camden, "after a verdict of acquittal." "Yes," said Lord Thurlow. "No, I thank you," said Lord Camden.[6] The bill then passed the committee, and it was read a third time and passed without a division.[7]

The Act [8] is declaratory in form. But, as Stephen has said, the fact that it is put into this form was a drafting device, in order to convey the meaning that "the law which the courts had in fact made ought to have been made otherwise than it was."[9] Fox said that he was convinced that the law as stated by the judges was good law.[10] The first section provides that, on the trial of an indictment or information for libel, the jury may give a general verdict upon the whole matter in issue, and shall not be directed by the judge to find the defendant guilty "merely on proof of the publication by such defendant of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information." This section settles the law in the sense contended for by Lord Camden and Erskine. The second section provides that the judge on a trial for libel, shall, "according to his discretion," give his opinion and direction to the jury on the matters in issue, in the same way as in other criminal cases. This section was introduced because, in *The Dean of St. Asaph's Case*, the judge had refused to give any direction to the jury as to whether the pamphlet in question was or was not a libel.[11] The section was sometimes interpreted as

[1] Parlt. Hist. xxix 591. [2] Ibid 602. [3] Ibid 1036, 1293-1299.
[4] Above 679-680. [5] Parlt. Hist. xxix 1431. [6] Ibid 1536-1537.
[7] Ibid 1537. [8] 32 George III c. 60. [9] H.C.L. ii 347-348.

[10] "He maintained that the filling up of the innuendoes was the province of the jury, and after they were filled up, the tendency and consequences were inferences of law; and he took this to be the real state of the law; though it was by no means agreeable to his opinion of what it ought to be," Parlt. Hist. xxix 559.

[11] Buller J. had said, "it is not for me, a single judge sitting here at *nisi prius*, to say, whether it is or is not a libel," 21 S.T. at p. 945; this was one of the grounds on which Erskine had based his motion for a new trial, ibid at p. 958; see Stephen, H.C.L. ii 346-347.

a statutory direction to the judge to give his opinion whether or not the writing was libellous. But the better opinion seems to be that the phrases "in his discretion," and "as in other criminal cases," have the effect of leaving it to the discretion of the judge whether or not to give an opinion.[1] The third section preserves the jury's right to give a special verdict if they see fit to do so. The fourth and last section provides that if the jury find the defendant guilty, he is to have the same right to move in arrest of judgment as he had before the passing of the Act. The reason for and the effect of this section is explained by Lord Blackburn in *The Capital and Counties Bank v. Henty*.[2] "The Legislature," he said,[3] "passing an enactment in favour of defendants, had no intention to put them in a worse position than before, and to make the verdict of a jury conclusive against the defendants." It therefore preserved their right, if found guilty, to move the court in arrest of judgment on the ground that the writing is not a libel. The result is that "if the defendant can get either the court or the jury to be in his favour he succeeds."[4] It follows, as Lord Blackburn pointed out, that if, in pursuance of this section, the court is asked to arrest judgment on the ground that the writing is not libellous, it must settle this matter for itself. It must ask itself, not whether the jury or the court could reasonably have held the writing to be libellous, but whether the prosecution has satisfied the onus of proving that it is libellous.[5]

Thus the Act ensures to a person accused of libel both the security of the power of a jury to give a general verdict, and the security of the power of the court to adjudicate upon the character of the writing which he is charged with publishing. He has both the security contended for by Lord Camden and Erskine, and the security, which Lord Mansfield considered to be all sufficient,[6] of an appeal to the Court; so that the settlement

[1] Stephen, H.C.L. ii 346.

[2] (1882) 7 A.C. 741.

[3] At p. 775; Lord Blackburn pointed out, at pp. 774-775, that Wills J. who took the view that the jury had a right to give a general verdict, above 676 n. 5, took the view that, if the jury convicted, the accused could move in arrest of judgment.

[4] 7 A.C. at p. 776.

[5] "It seems to me that when the Court come to decide whether a particular set of words published under particular circumstances are or are not libellous, they have to decide a very different question from that which they have to decide when determining whether another tribunal, whether a jury or another set of judges, might, not unreasonably, hold such words to be libellous. In fact whenever a verdict has been passed against a defendant in a case of libel, and judgment has been given in the court below, those who bring their writ of error on the ground that there was no libel, assert that both the jury and the Court below have gone wrong: but they are not called upon to say that the words were incapable of conveying the libellous imputation; it is enough if they can make out, to the satisfaction of the Court in error, that the onus of showing that they do convey such an imputation is not satisfied," 7 A.C. at p. 776.

[6] Above 679.

made by Fox's Act is very favourable to the accused. We must now consider its broad legal and constitutional results.

(4) *The legal and constitutional results of this settlement.*

In 1783 Lord Mansfield said :[1] "To be free is to live under a government by law. The liberty of the press consists in printing without any previous license, subject to the consequences of law." This is as true to-day as in 1783.[2] Fox's Act did not change the substance of the law of libel. Still less did it alter the rule of constitutional law, that any man may speak or write what he pleases, provided that he does not transgress the law as to defamation.[3] It changed only the functions of certain parts of the machinery by which the law of defamation was administered. But that change had very important reactions upon the substantive law. Any such change was deprecated by Lord Mansfield and those who thought with him, because they foresaw these reactions. In their view it was essential to keep the question of libel or no libel as a pure question of law for the court, because otherwise the law would be wholly uncertain. Lord Mansfield said :[4]

> Miserable is the condition of individuals, dangerous is the condition of the state, if there is no certain law, or, which is the same thing, no certain administration of the law to protect individuals, or to guard the state. . . . That the law shall be in every particular cause what any twelve men, who shall happen to be the jury, shall be inclined to think, liable to no review, and subject to no control, under all the prejudices of the popular cry of the day, and under all the bias of interest in this town, where, thousands, more or less, are concerned in the publication of newspapers, paragraphs, and pamphlets. Under such an administration of law, no man could tell, no counsel could advise, whether a paper was or was not punishable.

Lord Mansfield was right. It is impossible to tell in border-line cases whether a jury will adjudge this or that publication to be a libel. It is, broadly speaking, true to say that a man can publish anything he pleases provided that, if proceedings against him are taken, he can induce either a jury[5] or the court,[6] to say that the matter published is not a libel.

[1] 21 S.T. at p. 1040.

[2] "Our present law permits anyone to say, write and publish what he pleases; but if he make a bad use of this liberty he must be punished. If he unjustly attack an individual, the person defamed may sue for damages; if, on the other hand, the words be written or printed, or if treason or immorality be thereby inculcated, the offender can be tried for the misdemeanour either by information or indictment," Odgers, Libel and Slander (5th ed.) 12.

[3] Dicey, Law of the Constitution (7th ed.) 236.

[4] 21 S.T. at p. 1040 ; cp. R. v. Miller (1770) 20 S.T. at pp. 894-895.

[5] "Freedom of discussion is, then, in England little else than the right to write or say anything which a jury consisting of twelve shopkeepers, think it expedient should be said or written," Dicey, Law of the Constitution (7th ed.) 242, citing R. v. Cutbill (1799) 27 S.T. at p. 675.

[6] Above 691.

But the evil consequences which Lord Mansfield anticipated have not ensued. There are two main reasons for this. In the first place, because the law of libel as expounded by Lord Mansfield was not suited to the needs of the day, it was not possible to enforce it. Juries, conscious of its unsuitability, and moved by the eloquence of such orators as Erskine, refused to convict in the plainest cases.[1] After Fox's Act it was easier to get convictions.[2] The law may not have been so certain as Lord Mansfield would have liked to see it, but it was enforced. The jury, when the disturbing influence of this controversy had been removed, returned to their usual attitude of deference to the advice of judges who were able and impartial—an attitude on the part of the jury and qualities in the judges which are the conditions precedent to the successful working of the jury system.[3] In the second place, all branches of the law must be kept more or less in accord with the public opinion of the day if they are to work efficiently; and in no branch of the law is this more essential than in the law which regulates the liberty of discussion. It is because the change made by Fox's Act introduced a machinery, which ensured that the law of libel was administered in such a way that this liberty was exercised in accordance with this opinion, that it has worked well. In this respect Erskine was a far truer prophet than Lord Mansfield. In *The Dean of St. Asaph's Case*[4] he pointed out that a jury was a much better tribunal than the court in cases of libel.

If they know that the subject of the paper is the topic that agitates the country around them; if they see danger in that agitation, and have reason to think that the publisher must have intended it, they say he is guilty. If, on the other hand, they consider the paper to be legal and enlightening in principle; likely to promote a spirit of activity and liberty, in times when the activity of such a spirit is essential to the public safety, and have reason to believe it to be written and published in that spirit; they say, as they ought to do, that the writer or the publisher is not guilty. Whereas the judgment of the court upon the language of the record must ever be in the pure abstract; operating blindly and indiscriminately upon all times, circumstances, and institutions; making no distinction between the glorious attempts of a Sidney

[1] Above 689.

[2] "The convictions after the Libel Act were as common as they were before, if not commoner," Stephen, H.C.L. ii 363.

[3] As to this matter see Holdsworth, Some Lessons from our Legal History 85; Burke said in 1771, "juries ought to take their law from the bench only; but it is our business that they should hear nothing from the bench but what is agreeable to the principles of the constitution. The jury are to hear the judge, the judge is to hear the law when it speaks plain; when it does not he is to hear the Legislature," Parlt. Hist. xvii 53.

[4] (1783) 21 S.T. at p. 1008; in the case of R. v. Stockdale (1789) 22 S.T. at p. 282, he pointed out that the latitude to be allowed to the press "on general subjects," "cannot be promulgated in the *abstract*, but must be judged of in the *particular instance*, and consequently . . . must be judged of by you [the jury], without forming any possible precedent for any other case."

or a Russell struggling against the terrors of despotism under the Stuarts, and those desperate adventurers of the year forty-five who libelled the person, and excited rebellion against the mild and gracious government of King George II.

Erskine was also a true prophet when in 1792, in his defence of Thomas Paine, he predicted the establishment of the principles upon which the law would come to judge of the guilt or innocence of published writings. He was then speaking primarily of writings upon government, because it was for a writing upon the English government, to wit the book entitled *The Rights of Man*, that Paine was indicted. But his principles apply, *mutatis mutandis*, to writings on other topics. He said :

The proposition which I mean to maintain as the basis of the liberty of the press, and without which it is an empty sound, is this : that every man, not intending to mislead, but seeking to enlighten others with what his own reason and conscience, however erroneously, have dictated to him as truth, may address himself to the universal reason of a whole nation, either upon the subjects of governments in general, or upon that of our own particular country ; that he may analyse the principles of its constitution, point out its errors and defects, examine and publish its corruptions, warn his fellow citizens against their ruinous consequences, and exert his whole faculties in pointing out the most advantageous changes in establishments which he considers to be radically defective, or sliding from their object by abuse. All this every subject of this country has a right to do, if he contemplates only what he thinks would be for its advantage, and but seeks to change the public mind by the conviction which flows from reasonings dictated by conscience. If indeed he writes *what he does not think ;* if contemplating the misery of others, he wickedly condemns what his own understanding approves ; or, even admitting his real disgust against the government or its corruptions, if he *calumniates living magistrates*, or holds out to individuals that they have the right to run before the public mind in their *conduct*, that they may oppose by contumacy or force what private reason only disapproves ; they may disobey the law because their judgment condemns it ; or resist the public will because they honestly wish to change it—he is a criminal upon every principle of rational policy, as well as upon the immemorial precedents of English justice ; because such a person seeks to disunite individuals from their duty to the whole, and excites to overt acts of *misconduct* in a part of the community, instead of endeavouring to change, by the impulse of reason, that universal assent which, in this and every other country, constitutes the law for all.

When Erskine spoke these words these principles were not completely recognized ;[2] and in times of political excitement they are apt to be disregarded. But, in the course of the nineteenth century, they came to be recognized as the right test to apply, in order to decide whether or not any given writing

[1] 22 S.T. at pp. 414-415 ; the way in which these principles have gradually prevailed is very well illustrated by the history of the law as to blasphemous libels, see vol. viii 410, 413-414, 414-416.

[2] Above 693 n. 4.

oversteps the limit set by the law to the liberty of discussion. In Erskine's statement, therefore, we find the earliest exposition of the principles of our modern law. Their strict enforcement is a condition precedent for the maintenance of the stability of the state.

Sir Frederick Pollock has truly said that

> Our fathers laboured and strove chiefly in the field of Crown law to work out those ideals of public law and liberty which are embodied in the Bill of Rights. . . . Pleas of the Crown, to use the old English catchword, have a far higher scope than the repression of vulgar crime. Precedents of this class exhibit in action the ultimate political principles of the Common Law.[1]

There is no better illustration of this truth than the manner in which the right to liberty of discussion has been envisaged and regulated by the common law. The refusal of Parliament to renew the Licensing Act in 1694, left the definition of this right to be worked out by the courts of common law in accordance with the principles of that law; and so the common law courts, with some assistance from the Legislature, were able to give the right its modern content—a content which gives the fullest expression to those two complementary ideas of liberty and responsibility to the law, which have ever been the distinctive note of common law rights and powers and duties. The effect of the action of Parliament in 1694 upon the evolution of this right, is the same as the effect of the destruction of the jurisdiction of the Council and Star Chamber, and the Revolution of 1688, upon the evolution of many other constitutional rights of Englishmen. Because those rights were left to be developed by the machinery and in accordance with the principles of the common law, they were stated, not as abstract privileges of the subject, but, like other common law rights, as deductions from the principles and rules, substantive and adjective, of the common law.[2] Their exact content was developed, as other common law rights were developed, by decided cases. That meant a slow development; but it meant also a full and an effectual development—as is shown by the history of the way in which the rights to personal liberty and liberty of discussion have been secured and defined. We shall see that the development of the right of public meeting, and the power of the state to suppress riots and rebellions, have been worked out by the

[1] Genius of the Common Law 89-90.

[2] "As every lawyer knows, the phrases 'freedom of discussion' or 'liberty of the press' are not to be found in any part of the statute book nor among the maxims of the common law. As terms of art they are indeed quite unknown to our Courts. At no time has there in England been any proclamation of the right to liberty of thought or to freedom of speech," Dicey, Law of the Constitution (7th ed.) 235-236.

common law in exactly the same way, and, consequently, that they possess very similar characteristics. But, before dealing with them, I must say something of the right of the subject to petition the Crown or Parliament. The exercise of this right to petition almost presupposes the right of public meeting;[1] and very many of the public meetings of the eighteenth century were called together for the purpose of preparing a petition to Parliament.

The Right to Petition

The most important function of the King's Council in Parliament in Edward I's reign was the receiving and answering of petitions.[2] Some of these petitions asked for a remedy which could be given by the courts of common law, others asked for a remedy which the courts of common law were unable to give, others asked for a change in or an addition to the law.[3] The first two classes of petitions ceased in course of time to be addressed to the King in Parliament, and came to be addressed to the appropriate courts. Petitioners for these remedies took their cases direct to the common law courts, to the court of Chancery, or, till 1640, to the Council or Star Chamber. The third class of petitions were either petitions addressed by Parliament itself to the Crown, or petitions of communities, or of private persons or bodies of persons, to the Crown or to Parliament. In the former case they were the foundation upon which legislation was based, till, in the fifteenth century, the procedure of legislation by bill assented by the Crown, was substituted for the older procedure of legislation by the Crown on the petition of Parliament.[4] In the latter case, we shall see that these petitions, if acceded to, became the private bill legislation of our modern law.[5] Thus all these classes of petitions had come to initiate separate and well-defined legal processes of very diverse kinds. But there was still left an undefined class of public petitions addressed to the King or Parliament, which complained of grievances and asked for some redress, legislative or otherwise. These petitions had begun to attract attention at the end of the sixteenth century.

A committee of grievances, to which petitions were referred, was appointed by the House of Commons in 1571, and throughout the reigns of James I and Charles I entries appear in the Journals of the

[1] "This right to petition involved the right of private persons to meet for the joint preparation and signature of the statement of their grievances. It involved moreover the right to meet for deliberation on the opportune moment to present a petition," Halévy, History of the English People in 1815 135.

[2] Vol. i 354-355.

[3] Ibid 355.

[4] Vol. ii 438-440.

[5] Vol. xi 289.

House regulating or referring to the proceedings of this committee. In January 1640 we find this entry: members added to the committee for sorting petitions, and are specially to consider of and to sort such petitions as concern the public.[1]

Petitions multiplied during the years in which the Long Parliament sat. It was alleged by Clarendon that some of them did not represent the views of their signatories;[2] and it is certain that the numbers who attended to present them, gave opportunities for that mob violence which often interfered seriously with freedom of Parliamentary debate.[3] Thus when, in 1642, the majority of the House of Commons wished to put pressure upon the Lords to pass the Militia Bill, "their old friends of the City in the same numbers flocked to Westminster, but under the new received and allowed style of petitioners."[4] In 1647 there was such an outbreak of tumultuous petitions that Parliament made an ordinance, "that it should be treason to gather and solicit the subscriptions of hands to petitions." But this ordinance so offended all parties that Parliament was compelled within two days to revoke it.[5] The preamble to the statute of 1661[6] against tumultuous petitions, set out the "sad experience" gained by the Long Parliament of the effects of such petitions.[7] It then enacted that no petition to the King or Parliament for the alteration of matters established in church or state was to be signed by more than twenty persons, unless the petition were approved by three or more justices of the peace of the county from which the petition emanated, or by a majority of the grand jury of that county, or in London by the mayor, aldermen and common council. No petition was to be presented to the King or Parliament by more than ten persons.[8]

This Act by implication recognizes the right to petition,

[1] Anson, Parliament (5th ed.) i 393.

[2] "It was a strange uningenuity and mountebankery that was practised in the procuring of those petitions; which continued ever after in the like addresses. The course was, first, to prepare a petition very modest and dutiful, for the form; and for the matter not very unreasonable; and to communicate it at some public meeting, where care was taken it should be received with approbation: the subscription of very few hands filled the paper itself, where the petition was written, and therefore many more sheets were annexed, for the reception of the numbers, which gave all the credit and procured all the countenance, to the undertaking. When a multitude of hands was procured, the petition itself was cut off, and a new one framed, suitable to the design in hand, and annexed to the long list of names which were subscribed to the former," History of the Rebellion (ed. 1826) i 357-358.

[3] Ibid ii 166—a petition from Buckinghamshire brought up by six thousand men; ibid 206—petitions from Middlesex, Essex, and Hertford.

[4] Ibid 221. [5] Ibid v 460.

[6] 13 Charles II St. 1 c. 5; a similar ordinance had been issued in 1648, vol. vi 426 n. 15.

[7] See the Preamble cited vol. vi 167.

[8] § 2; the Act was not to hinder any persons, not exceeding twenty in number, from presenting a petition as to any public or private grievance to a member of Parliament or to the King, nor any address to the King by members of Parliament while Parliament was sitting, § 3.

since it lays down conditions for the exercise of that right in the case of petitions for the alteration of matters established in church or state.[1] The fact that this right existed was restated by the House of Commons in 1669 in a resolution, which also laid it down that it was the right of the House "to judge and determine concerning the nature and matter of such petitions, how far they are fit or unfit to be received."[2] Because the statute of 1661 thus merely lays down conditions for the exercise of the right in certain cases, it follows that it is not affected in any way by the clause of the Bill of Rights, which declared that "it is the right of the subjects to petition the King and all commitments and prosecutions for such petitioning are illegal."[3] In the proceedings against Lord George Gordon for high treason, Lord Mansfield and the court of King's Bench laid it down that the Act of Charles II was in no way affected by this clause of the Bill of Rights.[4]

But until after the Revolution the right of the subject to petition, like many of the other rights of the subject, was not fully recognized. In 1679 the action of the King in proroguing Parliament called forth a multitude of petitions and counter petitions—the petitioners asking that Parliament should assemble, and their opponents expressing their abhorrence of these petitions;[5] and it is in the division of the two parties of "petitioners" and "abhorrers" that we find the germs of the Whig and Tory parties "ranged against each other under their banners of liberty and loyalty."[6] The King issued a proclamation forbidding his subjects to promote subscriptions to, or to join in, the getting up of these petitions.[7] This prohibition was clearly an infringement of the right of the subject to petition; and, in the following year, Parliament directed that North should be impeached for his share in drawing the proclamation.[8] James II's prosecution of the Seven Bishops was not so clearly an infringement of the right to petition, since they were prosecuted, not for presenting a petition, but for stating in it that the King

[1] See Parlt. Hist. v App. XVIII at pp. ccxiii-ccxiv.

[2] Anson, Parliament (5th ed.) i 394; after the Revolution the House refused to accept petitions against money bills, see Hatsell (ed. 1785) iii 166; Parlt. Hist. ix 5, 1061-1065.

[3] 1 William and Mary St. 2 c. 2 § 1.

[4] "I speak the joint opinion of us all, that the Act of Charles II is in full force; there is not the colour for a doubt: the Bill of Rights does not mean to meddle with it at all: it asserts the right of the subject to petition the King, and that there ought to be no commitments for such petitioning; which alluded to the case of the bishops in king James's reign, who petitioned the king and were committed for it. But neither the Bill of Rights nor any other statute repeals this Act of Charles II: and Mr. Justice Blackstone, in his Commentaries, treats of this Act as in full force," (1781) 21 S.T. at p. 646.

[5] Hallam, Const. Hist. (9th ed.) ii 442-443. [6] Ibid 442.

[7] Tudor and Stuart Proclamations i no. 3703; vol. vi 304 and n. 6.

[8] Lives of the Norths i 227, 229-230; vol. vi 533.

had no such power of dispensing with or of suspending laws as he had claimed; and in fact the right to petition was recognized by Holloway, J., in his summing up in that case.[1] But the right was much minimized by Allybone, J.;[2] and no doubt it was the fact that the document for publishing which the bishops were indicted was a petition, as well as the fact that Charles II's proclamation had thrown doubts on the right to petition, which caused the framers of the Bill of Rights to declare that the right existed. But even after the Revolution it continued to be a right which it was dangerous to exercise. Just as James II construed a petition which laid down propositions as to the extent of his prerogative, with which he disagreed, as a seditious libel; so the House of Commons, in the case of the Kentish petitioners in 1701, took upon themselves to imprison some of those who had presented the petition, because the majority of the House were opposed to the policy which the petitioners asked it to adopt.[3]

During the first three-quarters of the eighteenth century petitions on current political topics were rare.[4] But some persons saw that the right of petitioning was a valuable aid to the deliberations of Parliament. In 1721 a petition from the City of London to the House of Lords, that it might be heard against some of the clauses of a bill relating to quarantine, was rejected; but the dissentient peers, in their protest against this rejection, pointed out that

> an universal grievance, which may be occasioned by any general Act, must be represented to the Legislature by particular persons or bodies corporate, or else it cannot be represented at all; and that the rejecting such petitions and not receiving them is the way to occasion disorders and tumults.[5]

And it should be noted that this right to petition was the more valuable since, on the presentation of a petition, its reading and the debate thereon took precedence of all other business.[6]

[1] "To deliver a petition cannot be a fault, it being the right of every subject to petition" (1688) 12 S.T. at p. 426.

[2] "I do agree that every man may petition the government or the king in a matter that relates to his own private interest, but to meddle with a matter that relates to the government, I do not think my lords the bishops had any power to do more than any others. When the House of Lords and Commons are in being, it is a proper way of applying to the king: there is all the openness in the world for those that are members of Parliament to make what addresses they please to the government . . . but if every private man shall come and interpose his advice, I think there can never be an end of advising the government," ibid at p. 428.

[3] Parlt. Hist. v 1251; and see ibid App. XVIII for a tract on the whole subject; similarly the Long Parliament thanked petitioners whose views agreed with the majority, Clarendon, History of the Rebellion (ed. 1826) ii 221: but "sharply reprehended" and even imprisoned those who expressed views distasteful to them, ibid ii 348.

[4] Erskine May, Constitutional History (9th ed.) ii 62.

[5] Parlt. Hist. vii 931.

[6] Erskine May, op. cit. ii 69; a petition, if accepted, might be referred to a committee to consider and report thereon; thus in 1736 a petition of the justices of

The great days of petitioning began in 1779, when an organization to promote petitions for measures of Parliamentary and economic reform, originating amongst the freeholders of Yorkshire, spread to many other counties and cities.[1] A system of corresponding committees was set up; and "the meetings at which the petitions were agreed to awakened the public interest in questions of reform to an extraordinary degree, which was still further increased by the debates in Parliament on their presentation."[2] The iniquities of the slave trade were the occasion of a much larger number of petitions than the question of Parliamentary reform.[3] But it was not till the end of the second decade of the nineteenth century, when many reforms were urgent and imminent, that the number of petitions grew rapidly.

In 1824, an agitation was commenced, mainly by means of petitions, for the abolition of slavery; and from that period till 1833, when the Emancipation Act was passed, little less than twenty thousand petitions were presented: in 1833 alone, nearly seven thousand were laid before the House of Commons. . . . In 1827 and 1828 the repeal of the Corporation and Test Acts were urged by upwards of five thousand petitions. Between 1825 and 1829, there were about six thousand petitions in favour of the Roman Catholic claims, and nearly nine thousand against them.[4]

Since the presentation of a petition could always be made the occasion of a debate, which took precedence to the claims of other business,[5] these debates threatened to absorb the whole time of the House of Commons. It was for this reason that in 1839 the House stopped the practice of debating the questions raised by a petition on its presentation.[6] By standing orders of 1842 and 1853, when a member presents a petition, there is a statement as to the parties petitioning, the number of signatures, the allegations made in it, and the concluding prayer. No debate is allowed unless the matter is one of urgency.[7]

It is obvious that the preparation of these petitions presupposes the existence of a right of public meeting. We must now consider the nature of this right, and the history of the law as to the conditions under which it can be exercised.

Middlesex against the excessive use of spiritous liquors was referred to a committee, which came to several resolutions as to the regulations which should be made as to their sale and the duties to be imposed on them, Parlt. Hist. ix 1032-1034.

[1] Erskine May, op. cit. ii 63. [2] Ibid 64. [3] Ibid 64-65.

[4] Ibid 66-67; Anson says, Parliament 395, that in the five years ending in 1789 the number of petitions was 880, in the five years ending 1831 it was 24,492, and in the five years ending 1877 it was 91,846.

[5] Above 699. [6] Erskine May, op. cit. ii 69.

[7] Anson, Parliament 348-349.

The Right of Public Meeting

As with the liberty of discussion, so with the right of public meeting, there is no specific recognition of this right as a privilege of the subject. Like the liberty of discussion, its existence, where it exists, and its limitations, depend upon deductions from the principles and rules, substantive and adjective, of the common law; and its content is similarly characterized by the two complementary ideas of liberty and responsibility to the law. "The right of assembly," says Dicey,[1] "is nothing more than a result of the view taken by the Courts as to individual liberty of person and individual liberty of speech." The law does not give or guarantee a right of public meeting; but it does not forbid it, unless the exercise of the right can, in the circumstances, be shown to infringe some provision of the criminal law, of the law of tort, of a statute, or of a regulation having the force of a statute. The attitude which the common law has always taken with respect to this right was clearly and accurately expressed by Wills, J., in 1888. He said:[2]

It was urged that the right of public meeting, and the right of occupying any unoccupied land or highway that might seem appropriate to those of her Majesty's subjects who wish to meet there, were, if not synonymous, at least correlative. We fail to appreciate the argument, nor are we at all impressed with the serious consequences which it was said would follow from a contrary view. There has been no difficulty experienced in the past, and we anticipate none in the future, when the only and legitimate object is public discussion, and no ulterior and injurious results are likely to happen. Things are done every day, in every part of the kingdom, without let or hindrance, which there is not and cannot be a legal right to do, and not unfrequently are submitted to with a good grace because they are in their nature incapable, by whatever amount of user, of growing into a right.

In the eighteenth century the right of public meeting was as yet hardly envisaged as a constitutional right of the subject. What law there was on the subject was as yet, to use a phrase of Sir Henry Maine's, still secreted in the interstices of the law of crime and tort. We have seen that the law had acquired some detailed rules as to the meaning of the offence of unlawful assembly;[3] that, if a meeting was an unlawful assembly, magistrates and others were justified in using reasonable force to disperse it;[4] that magistrates could be made criminally liable if they failed to take measures to disperse it;[5] and that

[1] Law of the Constitution (7th ed.) 267.
[2] *Ex parte* Lewis 21 Q.B.D. at p. 197.
[3] Vol. viii 325-327.
[4] Ibid 330.
[5] Ibid 331; Kennett, the Lord Mayor of London, was prosecuted and convicted of a breach of duty for not ordering the troops to use force to disperse the Gordon riots, below 706.

ordinary citizens could be made liable, if they did not lend their aid to disperse an unlawful assembly, when called upon by the magistrates to do so.[1] We have seen, also, that the law had acquired some rules as to how much force could lawfully be used to suppress an unlawful assembly. Only reasonable force could be used; and both magistrates and citizens must, at their peril, hit the mean between excess and defect.[2] Similarly, some of the rules of the law of tort, indicated certain other limitations. The rules as to trespass indicated some of the places where such a meeting could not be held; and the rules as to nuisance showed that, even though no trespass had been committed, as in the case where a meeting was held in a highway, yet if it caused a nuisance by preventing the use of the highway for passage,[3] the holding of such a meeting was contrary to law.

During the greater part of the eighteenth century public meetings were not very common events. If they were held they were not meetings of a kind that raised questions as to their legality, or as to the conditions in which, and the means by which, they could be dispersed. They were meetings which, in the words of Wills, J., were held for public discussion, from which no ulterior or injurious results were likely to flow.[4] It is a significant fact that Blackstone has nothing to say of this right. Like the older authors he merely discourses of the settled law as to riots, routs, and unlawful assemblies.[5] We have seen that it was not till some years after the publication of the Commentaries, that the practice of organizing the promotion of petitions to Parliament, which was the occasion of very many public meetings, became common.[6] It was the growth of this habit of petitioning Parliament, and of other forms of political agitation, which marked the end of the eighteenth and the beginning of the nineteenth centuries, that made public meetings common. It was in the cases to which these practices gave rise that the right of public meeting began to be envisaged as a constitutional right, and its limits began to be defined. The constant agitation—political, religious, social, and economic—which has characterized the nineteenth and twentieth centuries, has been the cause which has made the right of public meeting an important topic of constitutional law.

At the beginning of the nineteenth century, some part was played in this development by the Legislature. In 1817, as the result of reports issued by secret committees of the two Houses

[1] Vol. viii 331. [2] Ibid 330; below 706.

[3] Dovaston v. Payne (1795) 2 Hy. Bl. 527 shows that the only legitimate use of the highway is for passage; and R. v. Carlile (1834) 6 C. and P. 636 decides that a person who attracts a crowd to look at objects exhibited in his shop window, so that the street is obstructed, is guilty of an indictable nuisance.

[4] Above 701. [5] Comm. iv 146-147. [6] Above 700.

of Parliament,[1] an Act "for the more effectually preventing seditious meetings and assemblies" imposed serious restrictions on the right to hold public meetings.[2] Meetings of more than fifty persons, except county meetings, were not to be held unless a notice of the meeting was inserted in the newspapers, or given to the clerk of the peace, signed by at least seven householders resident in the place where it was proposed to hold the meeting.[3] A meeting held without this notice, for the purpose of presenting an address to the King or Parliament, or of proposing alterations in the law, or of deliberating on grievances, was to be an unlawful assembly.[4] If the members of such an assembly did not disperse within an hour after a proclamation ordering them to do so had been made, they were guilty of felony without benefit of clergy.[5] Powers were given to disperse seditious assemblies, though held in pursuance of a notice.[6] Places at which lectures were given or debates held were to be deemed to be disorderly houses, unless they had been licensed by two justices of the peace;[7] and the license was to be forfeited if seditious or immoral lectures were given.[8] Special regulations were made as to political meetings of more than fifty persons within a mile of Westminster Hall.[9] Apart from legislation passed to prevent the disturbance of religious services,[10] this was the most important contribution of the Legislature to this branch of the law.

The part played by the courts in developing this branch of the law centres mainly round the elaboration of the definition of the meaning of the term unlawful assembly,[11] and of the rights and liabilities of the police and others in connection with the control or dispersal of these assemblies. After the repeal of the Act of 1817,[12] it is in these rules that the limitations upon the right of public meeting—other than the limitations imposed by the law as to trespass and nuisance [13]—are contained.

We have seen that the main principles of the law as to what kinds of assembly were unlawful had been ascertained at the beginning of the nineteenth century.[14] In the case of *R. v. Hunt*, Bayley, J., said to the jury that, in considering whether or not a meeting was an unlawful assembly, "you must look

[1] Stephen, H.C.L. ii 295. [2] 57 George III c. 19.
[3] §§ 1 and 2. [4] § 3. [5] § 5. [6] § 7.
[7] §§ 14 and 17. [8] § 19.
[9] § 23; § 24 provided for the suppression of Spencean Societies and other similar societies which "hold and profess for their object the confiscation and division of the land, and the extinction of the funded property of the kingdom."
[10] 1 Mary Sess. 2 c. 3 § 1; 52 George III c. 155 § 12; 9, 10 Victoria c. 59 § 4; 23, 24 Victoria c. 32 §§ 2 and 3.
[11] For the earlier law see vol. viii 325-327.
[12] The greater part of the Act was repealed by the Statute Law Revision Act 1873, and other sections were repealed by the Statute Law Revision Acts of 1887 and 1890.
[13] Above 702. [14] Vol. viii 326-327.

to the purpose for which they meet; you must look to the manner in which they come; you must look to the means which they are using."[1] In the case of *R. v. Vincent*, Alderson, B., said that a meeting which, in the opinion of firm and rational men, was likely to endanger the peace of the neighbourhood, was an unlawful assembly.[2] Thus, as Kenny says,[3] the idea of an unlawful assembly is not confined to gatherings met together for the commission of some crime involving violence or breach of the peace, or to incite to sedition or breach of the law. It is applied also to gatherings for a lawful purpose, if those who take part in the meeting so act "as to give firm and rational men, having families and property there, reasonable ground to fear a breach of the peace."[4] But though a meeting which, by reason of the environment in which it is held and/or the conduct of those who hold it, gives reasonable ground to fear a breach of the peace, is an unlawful assembly,[5] a meeting which neither by reason of the environment in which it is held nor by reason of its conduct, gives rise to any such fear, is not; and the fact that a band of wrongdoers threaten to disturb it will not make it an unlawful assembly.[6]

The rights and liabilities of the police and others, who are called upon to control or disperse an unlawful assembly had been defined in the seventeenth and eighteenth centuries.[7] The effect of the nineteenth-century decisions has been to elaborate the law on this matter. Of the effect of these decisions I shall say something in the following section, in which I deal with the power of the state to suppress riots and rebellions.[8] It is sufficient at this point to say that, for the use of excessive force used to disperse an unlawful assembly, the police and others are liable either criminally or civilly; and that, if the assembly is not an unlawful assembly, they would be liable civilly or criminally for the use of any force used in dispersing it.[9] But

[1] (1820) 1 S.T. N.S. at p. 435. [2] (1839) 9 C. and P. at p. 109.

[3] Outlines of Criminal Law (2nd ed.) 282.

[4] R. v. Vincent (1839) 9 C. and P. at p. 109.

[5] Wise v. Dunning [1902] 1 K.B. 167; that both these factors must be taken into account is reasonably clear from what was said by Lord Alverstone C.J. and Darling J. in that case, ibid at pp. 176-177, 178-179; but as Lord Hewart pointed out in Duncan v. Jones [1936] 1 K.B. at p. 222 the law on this point is not finally settled.

[6] Beatty v. Gillbanks (1882) 9 Q.B.D. 308; Field J. said at p. 314, "I concede that everyone must be taken to intend the natural consequence of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants they would be liable . . . but the evidence set forth in the case does not support this contention. . . . What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a legal act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition." [7] Vol. viii 330-331. [8] Below 706-709, 712-713.

[9] Dicey, Law of the Constitution (7th ed.) 505-512.

it is also clear that the members of a lawful meeting have no right to assert their right to remain where they are by the use of force. "If," said Wilde, C.J.,[1] "the police had interfered with them, they were not at liberty to resist in any such circumstances; they ought to have dispersed by law, and have sought their remedy against any unjust interference afterwards." Moreover, if the police reasonably fear that a breach of the peace will result from the holding of a meeting, it is their duty to prevent it from being held, and those who disobey their orders can be convicted of the offence of obstructing the police in the execution of their duty.[2]

The Power of the State to suppress Riots and Rebellions

We have seen that the common and statute law gave the Crown adequate power to suppress riots.[3] A riot to effect an object of a public general nature—e.g. to break open prisons or to destroy meeting-houses—was a constructive levying of war against the King, and therefore high treason.[4] Otherwise a riot was only a misdemeanour. But if rioters in the course of their proceedings committed a felony, all were equally liable for the felony.[5] It was the duty of all citizens to apprehend a felon;[6] and if a rioter in these circumstances was killed in resisting apprehension, the homicide was justifiable.[7] If however no felony was committed, though magistrates and private citizens if called upon, must use force to restore order, they could, as a general rule, only use the force necessary for the purpose.[8] We have seen that it was due to the fact that the severity of the doctrine of constructive treason shocked the public conscience, and to the fact that the law did not give adequate protection to those who dispersed a riot when no felony was committed, that the Riot Act was passed in 1714.[9] That Act, which reproduced in a modified form previous Acts of Edward VI, Mary, and Elizabeth's reigns,[10] provided that if twelve or more persons assembled "to the disturbance of the publick peace," did not disperse within an hour after a proclamation ordering them to disperse had been read by a mayor, sheriff, or justice of the peace, they should be guilty of felony.[11] It also

[1] R. v. Ernest Jones (1848) 6 S.T. N.S. at p. 811.
[2] Duncan v. Jones [1936] 1 K.B. 218.
[3] Vol. viii 324-331. [4] Ibid 319-321, 328. [5] Ibid 329.
[6] Ibid 330. [7] Ibid.
[8] Ibid; but if a private citizen was called upon by a magistrate to help to suppress a riot, and killed a rioter who resisted, the homicide was prima facie justifiable, ibid 330-331 and 331 n. 2.
[9] Ibid 320, 328-329, 330; 1 George I St. 2 c. 5.
[10] 3, 4 Edward VI c. 5; 1 Mary sess. 2 c. 12; 1 Elizabeth c. 16; vol. iv 497.
[11] 1 George I St. 2 c. 5 § 1.

indemnified those who, in the course of dispersing the riot, killed, maimed, or hurt any of the rioters.[1] We have seen that this Act, though it added to the powers of the magistrates when its provisions were complied with, that is, when the proclamation had been read and the hour had elapsed, did not affect the common law powers or duties of magistrates and private citizens.[2] They were still bound to disperse riots with the force commensurate to the gravity of the situation—a force which might even include killing, if the rioters employed felonious violence, so that they could not be dispersed in any other way; and if they neglected their duty they were guilty of a misdemeanour.[3] They must, therefore, as Littledale, J., said in *R. v. Pinney*, "hit the exact line between excess and failure of duty."[4]

But, in the course of the eighteenth century, an erroneous belief had sprung up that the Riot Act had modified these common law principles, and that firearms could not be employed unless a magistrate had read the proclamation set out in the Act.[5] Moreover, in 1768-1769 the employment of the soldiers to suppress the Wilkite riots had led to such indignation that indictments had been found against some of the soldiers who had fired on the rioters,[6] and magistrates and ministers feared to employ them.[7] Dr. Johnson said in 1776, "the magistrates dare not call the guards for fear of being hanged. The guards will not come for fear of being given up to the blind rage of popular juries."[8] It was this erroneous belief and this fear which prevented the immediate suppression of the Gordon riots in 1780, and left London to be pillaged for three days by the mob. This belief was pronounced to be erroneous by Wedderburn the attorney-general;[9] and the King, declaring that at least one magistrate would do his duty, induced the Privy Council to give the necessary power to the troops to use force.[10] The riot was

[1] § 3; the express indemnification was probably unnecessary having regard to the fact that by § 1 all the rioters were felons.

[2] Vol. viii 331. [3] R. v. Kennett (1781) 5 C. and P. 282.

[4] "A party intrusted with the duty of putting down a riot, whether by virtue of an office of his own seeking (as in the ordinary case of a magistrate), or imposed upon him (as in that of a constable) was bound to hit the exact line between excess and failure of duty," R. v. Pinney (1832) 3 B. and Ad. at p. 957.

[5] This erroneous belief is illustrated by what was said in 1737 in a debate in the House of Lords on the murder of Porteous, Parlt. Hist. x 209; it was shared by Bentham who said in his *Theory of Legislation* 279, that, in the case of seditious disturbances, "warning precedes punishment; martial law is proclaimed, and the soldier cannot act till the magistrate has spoken. The intention of this rule is excellent; but what shall we say of its execution? The magistrate is obliged to go into the midst of the tumult; he must pronounce a long drawling formula which nobody understands; and bad luck to those who are on the spot an hour after"; for the exposure of this error by Lords Mansfield and Loughborough see below 707.

[6] Kenny, Criminal Law 285. [7] Lecky, History of England iv 321-322.

[8] Ibid 322 n. 1, citing Croker, Boswell 509.

[9] Campbell, Chancellors vi 137-138.

[10] Lecky, History of England iv 323.

promptly suppressed; and after its suppression the King made a speech to both Houses of Parliament, in which he informed them of the measures which he had taken.[1] In the debate on this speech in the House of Lords, Lord Mansfield without consulting books (for, as he pathetically said, alluding to the destruction of his library by the mob, "I have no books to consult")[2] gave a very clear exposition of the principles which underlie the modern law as to the power of the state to suppress riots.[3]

He said that it had been taken for granted that the King "in the orders he gave respecting the riots, acted merely upon his prerogative, as being entrusted with the protection and preservation of the state, in cases arising out of necessity, and not provided for in the ordinary contemplation and execution of law."[4] That view of the matter was an entire mistake. The King and his ministers had acted strictly in accordance with the law, the insurgents were guilty of acts of constructive treason, and also of many acts of felony. Every citizen not only may but must interfere to prevent such acts; and, if he refuses, when called upon by a magistrate, he is punishable. "What any single individual may lawfully do, so may any number assembled for a lawful purpose; which the suppression of riots tumults and insurrections certainly is."[5] *A fortiori* these duties may and must be performed by magistrates and other officials whose duty it is to see that the peace is kept. All acts done in discharge of these duties are justifiable, provided that the power to do these acts is not abused. It follows, then, that

> the persons who assisted in the suppression of those riots and tumults, in contemplation of law, are to be considered as mere private individuals, acting according to law, and upon any abuse of the legal power with which they were invested, are answerable to the laws of their country. For instance, supposing a soldier, or any other military person, who acted in the course of the late riots, had exceeded the powers with which he was invested, I have not a single doubt but he is liable to be tried and punished, not by martial law, but by the common and statute law of the realm.[6]

The idea that the military had more power during a riot, or that the law had been suspended, was quite baseless, and was due to a misunderstanding of the effect of the Riot Act.[7]

[1] Parlt. Hist. xxi 688-689. [2] Ibid 694. [3] Ibid 694-697.
[4] Ibid 694. [5] Ibid 695. [6] Ibid 696.
[7] Ibid 696-697; Lord Loughborough agreed; in 1780, in his charge to the grand jury, before whom were brought the indictments of Gordon and other rioters, he said, "I take this public opportunity of mentioning a fatal mistake into which many persons have fallen. It has been imagined, because the law allows an hour for the dispersion of a mob to whom the Riot Act has been read by a magistrate . . . that during that period of time, the civil power and the magistracy are disarmed,

Thus the law as to the power of the state to suppress riots is like the law as to liberty of discussion and as to the right of public meeting in this respect: it is based on the powers and rights which are given to individuals by the common law, and it is limited by the conditions which the common law imposes upon those powers and rights. Just as the right of liberty of discussion is the right of every man to say or write what he pleases provided that he does not infringe the law as to defamation;[1] just as the right of public meeting is the right of every man to come to a certain place to speak or hear speeches provided he does not infringe the law of crime or tort;[2] so the power of the state to suppress riots depends upon and is limited by the power given to, and the duty imposed on, each citizen and each magistrate to use the force necessary to suppress disorder.

This view of the law was approved by Lord Thurlow, who applied the same reasoning to the case of rebellion.[3] The Gordon riots, he said, were similar to the rebellions of 1715 and 1745 in that, in both cases, there was an actual insurrection. Therefore "the military, as well as every man in a brown coat, were justified in the commission of such trespasses and acts of homicide, for the purpose of restoring the public peace, as were justifiable in the years 1715 and 1745, for the purpose of putting an end to the rebellions then on foot in the kingdom."[4] The cases, he said, "were alike in their respective degrees, and the late insurrection was similar to the rebellions of 1715 and 1745, as far as it went."[5] It is obvious that this view of the law by implication denies to the Crown, even in case of rebellion, any special prerogative to deal with the situation by a proclamation of martial law or otherwise. The power of the Crown, like the power of any other magistrate, and indeed of every citizen, is derived from and measured by the necessity of the case. This was a view of the law which was backed by considerable authority. We have seen that it was the view taken by Hampden's counsel in *The Case of Ship Money*.[6] It was the view which by implication seems to be taken by such authorities as Comyns,[7]

and the king's subjects, whose duty it is at all times to suppress riots, are to remain quiet and passive. No such meaning was within the view of the Legislature; nor does the operation of the Act warrant any such effect. The civil magistrates are left in possession of those powers which the law had given them before; if the mob collectively or a part of it, or any individual, within and before the expiration of that hour, attempts or begins to perpetrate an outrage amounting to felony . . . it is the duty of all present, of whatever description they may be, to endeavour to stop the mischief, and to apprehend the offender," 21 S.T. at p. 493.

[1] Above 692.
[2] Above 701.
[3] Parlt. Hist. xxi 736-737.
[4] Ibid 738.
[5] Ibid.
[6] Vol. vi 52.
[7] Digest, *Parliament* H. 23—he there says, "martial law cannot be used in England without authority of Parliament."

Hargrave,[1] and Lord Loughborough,[2] when they denied that the Crown had any prerogative to govern his subjects by martial law. It is in substance the view which is taken by our modern law.[3] But it is not the view which was universally held in the eighteenth and nineteenth centuries ;[4] and we shall see that it is not till the present century that it has come, after considerable controversy, to be generally accepted.[5] The reasons for the long hesitation in accepting this view I must now examine.

The two main reasons are first, the view held by many lawyers that the Crown had, by virtue of its prerogative, a reserve of power to deal with a national emergency ; and, secondly, an impression that, in an emergency, the Crown could by its prerogative proclaim martial law, and that, after such proclamation, it could by virtue of that prerogative, adopt what measures it pleased for the restoration of order.

(1) We have seen that Hardwicke, his son Philip Hardwicke, and Lord Camden thought that the Crown had an indefinite power to act for the good of the country in a time of emergency ; and that it was upon this ground that Lord Camden defended the illegal embargo laid upon shipping in 1766.[6] It is easy to see how this idea gave rise to the impression, the fallacy of which Lord Mansfield exposed,[7] that the King's action in using the soldiers to suppress the Gordon riots, was based on the prerogative. We shall now see that the vagueness of the term " martial law," and the general uncertainty as to the legal force of a proclamation of martial law, were naturally and easily combined with this idea of an indefinite prerogative to act for the good of the country in a time of emergency, and gave rise to an idea that, under cover of a proclamation of martial law, the King had indefinite prerogative powers to take what measures he pleased for the restoration of order.

(2) The chequered history of the law which has governed the discipline of the army [8] sufficiently accounts for the vagueness

[1] Forsyth, Leading Cases 190 ; he says that, but for the preamble to 39 George III c. 11, below 712 n. 1, he would have thought that a claim to punish rebels by martial law was " an extension of martial law beyond its real object," and contrary to law, because martial law was applicable only to the army.

[2] " Martial law such as is described by Hale, and such also as it is marked by Mr. Justice Blackstone, does not exist in England at all. Where martial law is established, and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law, because the decision is by a court martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the constitution, and which has been for a century totally exploded. . . . It is totally inaccurate to state martial law as having any place whatever within the realm of Great Britain," Grant v. Gould (1792) 2 Hy. Bl. at pp. 98-99 ; this view was acted upon by the Irish court of King's Bench in Wolf Tone's Case (1798) 27 S.T. at p. 625 ; cp. Dicey, Law of the Constitution (7th ed.) 289-290.

[3] Below 712-713. [4] Below 710-712. [5] Below 712-713. [6] Above 364-365.
[7] Above 707. [8] Vol. i 573-578 ; vol. vi 225-230 ; above 378-380.

of the term "martial law," and the uncertainty as to the legal force of a proclamation of martial law. The court of the Constable and the Marshal, which had administered martial law to the army in the Middle Ages, had long been obsolete in the eighteenth century; and jurisdiction over soldiers was exercised by courts martial composed of officers of the army, acting under the statutory powers conferred by the annual Mutiny Act. The law which these courts martial administered was then called martial law—the modern term, military law, had not as yet been invented.[1] Martial law, in this sense of the word, was as definite a body of law as it is to-day; and its ambit was equally definite. It applied only to soldiers in the regular army and other persons defined by the Mutiny Act.[2] The courts martial which administered this body of law, and the law which they administered, were quite distinct from the court of the Constable and the Marshal and the law which it administered.

But some lawyers thought that they could detect a link between these modern courts martial and the court of the Constable and Marshal. The Crown could, they said, vest the powers of the court of the Constable and Marshal in committees of officers, and these modern courts martial, composed of committees of officers, could therefore be regarded as the successors of the court which had administered martial law in the Middle Ages.[3] It followed that the jurisdiction of these courts martial was wider than that given to them by the Mutiny Act and the Articles of War made thereunder. They could administer another sort of martial law—a martial law which applied to other persons besides soldiers in the regular army.[4] It is true

[1] "When Coke, and Hale, and Blackstone speak of martial law, it is plain they are speaking of the law applicable to the soldier, or what in modern phrase is called military law. It is plain they know of no other; and the fact that . . . such men as Lord Hale and Sir William Blackstone, with their accuracy of statement, call it martial law, and do not point out any distinction between martial law and military law as it is spoken of now, goes far indeed to show that they knew of no such difference, and that the distinction now supposed to exist is a thing that has come into the minds of men certainly much later than when these eminent luminaries of the law of England wrote their celebrated treatises," *per* Cockburn C.J. charge to the grand jury in R. v. Nelson and Brand, Special Report 99-100.

[2] Above 382-383.

[3] "Whether the said court can be holden by commission; it seems to be the better opinion of the court in *Parker's* case, that during the lunacy of an Earl Marshal, it may well be holden before commissioners deputed to exercise his office; and it seems hard to say, that such commissions founded on the plain necessity of the case, and intended to prevent a failure of justice, as to cases of which no other court hath conusance, are against the purview of the Petition of Right," Hawkins, P.C. Bk. II c. 4 § 14; but note that Parker's Case (1668) 1 Lev. 230 was a case concerned with the jurisdiction of the court over heraldry, and that the King's Bench distinguished the cases in which the court was administering martial law; in these cases the court must be held by both the Constable and Marshal, see vol. i 579 and n. 7.

[4] Hale, History of the Common Law (6th ed.) 42, when dealing with the martial law administered by the Constable and Marshal's court, speaks of it as "not a law,

that the Petition of Right had condemned this wide application of martial law, and had declared its illegality in time of peace.[1] But suppose that it was not a time of peace, suppose that the King's courts could not function regularly, was it then possible for the King to proclaim martial law, and to govern by martial law—to govern, in other words, by a system which allowed him to take any measures which he pleased to restore order? There was some authority in the eighteenth century in favour of an affirmative answer to this question. The commissions and instructions given to colonial Governors seem to assume that the Governor, or the Governor and Council, could proclaim martial law in an emergency,[2] and that this proclamation would suspend the ordinary law so far as was necessary "to answer the then military service of the public, and the exigencies of the province."[3] This attributes an effect to a proclamation of martial law which is denied to it at the present day. The view held to-day is that a proclamation of martial law "confers no power on the Governor which he would not have possessed without it," and that it operates only as a notice to the people of the course which is intended to be pursued.[4] The view that the proclamation suspends the ordinary law so far as is necessary "to answer the then military service of the public, and the exigencies of the province," presupposes that the Crown has some sort of a prerogative to proclaim martial law; and that, as a consequence of that proclamation, it has power to take any measures for the restoration of order that it may see fit to adopt. The Parliaments of Ireland and the United Kingdom seem to have taken this view of the

but something indulged rather than allowed as a law," and says that it is applicable only to members of the army or those of the opposite army; but it might be argued that, in his view, it applied to other soldiers besides those in the regular army; Blackstone, following Hale, describes martial law, as a "temporary excrescence" and not "part of the permanent and perpetual law of the kingdom," Comm. i 413; and he deals separately with the "law martial" created by the Mutiny Act, ibid i 414-415.

[1] Vol. i 576.

[2] Berriedale Keith, First British Empire 113, 145, 210; it was recognized in the eighteenth century that martial law could not be used in time of peace to discipline the troops, ibid 243; but this limitation upon the use of martial law does not touch the question whether or not the Crown could proclaim martial law, and act under such a proclamation in a time of emergency, in ways which might affect all the inhabitants of a district whether soldiers or civilians.

[3] "Nor do we apprehend that, by such proclamation of martial law, the ordinary course of law and justice is suspended or stopped, any further than is absolutely necessary to answer the then military service of the public, and the exigencies of the province," opinion of the attorney and solicitor-general, Henley and Yorke in 1757, Chalmers, Opinions i 267.

[4] "Such proclamation confers no power on the Governor which he would not have possessed without it. The object of it can only be to give notice to the inhabitants of the course which the Government is obliged to adopt for the purpose of restoring tranquillity," Opinion of the attorney and solicitor-general, Campbell and Rolfe in 1838, Forsyth, Leading Cases 198.

law when, in 1799,[1] 1803,[2] and 1834,[2] they recognized a prerogative power to make use of martial law in a time of emergency.

In the nineteenth century, the proceedings taken by Governor Eyre in 1865 to suppress the insurrection in Jamaica, raised the question whether the Crown had this prerogative power to proclaim martial law in case of rebellion. Some lawyers, notably Finlason,[3] maintained that the Crown had this prerogative power. They contended that a rebellion is a state of war. If a state of war exists, the Crown can use the military forces of the state as it pleases. Its prerogative in these circumstances is not controlled by the Mutiny Act which applies only to the regular army. This prerogative is quite different from the power which all citizens have at common law of using the degree of force which is necessary to prevent disorder. That power only provides the necessary means for quelling a riot. It merely allows an amount of force exactly proportional to the necessities of the case. It does not allow, as a proclamation of martial law allows, an absolutely free hand in dealing with the enemy. The preambles of the Acts of 1799, 1803, and 1834,[4] it was contended, bear out this view. In fact, it is probable that those who framed them held it—Hargrave certainly thought that they bore this construction.[5] On the other hand, Cockburn, C.J., in his very learned and elaborate charge to the grand jury, in the case of *R. v. Nelson and Brand*,[6] took the view which had commended itself to Mansfield, Thurlow, and Loughborough.[7] There is no prerogative power to proclaim martial law. Martial law is merely the application of the common law principle "that life may be protected and crime prevented by the immediate application of any amount of force which, under the circumstances, may be necessary."[8] This view, as Cockburn, C.J., showed in his charge, is justified both by history and authority. The subject was again discussed in the case of *Ex parte Marais*.[9]

[1] 39 George III c. 11, passed by the Irish Parliament, mentions in the preamble "the wise and salutary exercise of His Majesty's undoubted prerogative in executing martial law"; see Forsyth, Leading Cases 190.

[2] 43 George III c. 47 § 5, and 3, 4 William IV c. 4 § 40 provide that nothing in those Acts is to "diminish the acknowledged prerogative of His Majesty for the public safety, to resort to the exercise of martial law against open enemies and traitors."

[3] A Treatise on Martial Law; Review of the Authorities as to the Repression of Riot and Rebellion; Commentaries on Martial Law; see L.Q.R. xviii 126-127; for other supporters of this view see R. v. Nelson and Brand, Special Report 101-104.

[4] Above nn. 1 and 2.

[5] "With these statutes before me I am forced to resist any contrary impressions I may have as to the real boundary of martial law," Forsyth, Leading Cases 190; cp. the views of Headlam, Judge Advocate General, and Dundas cited in R. v. Nelson and Brand, Special Report 101-103.

[6] Special Report.

[7] Above 707, 708.

[8] Special Report 85.

[9] [1902] A.C. 109.

The result of that case, and of the discussions arising out of it,[1] has been to make it quite clear that the law laid down by Mansfield, Thurlow, Loughborough, Cockburn, and Stephen is correct.[2]

This account of the relation of the law courts in the eighteenth century to the organs of government and to the subject, shows that in relation both to the complex machinery of government, local and central, and to the subject, they played the part of umpires—defining spheres of jurisdiction, powers, and liberties. Two of the most important constitutional results of the part thus played by the courts were, first, the creation of a law-abiding habit in the nation, and secondly, a detailed application of that conception of the rule of law, which lawyers and statesmen had inherited from mediæval political thought, and had been adapting from the sixteenth century onwards, to the needs of the modern state. There was also a third constitutional result, which could not have been achieved if the courts had not held this unique position in the state—a separation of the powers of the state amongst a number of semi-autonomous organs of government. With this result I shall deal in the following section.

VII

The Separation of Powers

If a lawyer, a statesman, or a political philosopher of the eighteenth century had been asked what was, in his opinion, the most distinctive feature of the British constitution, he would have replied that its most distinctive feature was the separation of the powers of the different organs of government. In the first place, therefore, I must say something of this distinctive feature. In the second place I must say something of Montesquieu's famous theory that the secret of the excellence of the British constitution was due to this separation of the powers of government.

[1] L.Q.R. xviii 117-158; Stephen and Edward James, Opinion in Eyre's Case, Forsyth, Leading Cases 551, and Stephen, H.C.L. i 207-216.

[2] See Dicey, Law of the Constitution (7th ed.) chap. viii and note E pp. 538-555; Pollock, L.Q.R. xviii 152-158; Tilonko v. Attorney-General of Natal [1907] A.C. at p. 94 *per* Lord Halsbury; it follows that, if the military authorities set up courts to deal with the offences committed by persons against their orders, these are not regular courts, ibid at pp. 94-95, so that an order made by such a so-called court is not an order made in a criminal cause, and a writ of prohibition to it does not lie, Clifford v. O'Sullivan [1921] 2 A.C. 570.

The Extent to which the Powers of Government were separated

The division of the powers of the state between the King, Parliament, and the Courts, and the division of the legislative power of the state between the King, the House of Lords, and the House of Commons, were the most obvious features of the British constitution and British constitutional law, and the most obvious contrast to the despotic and centralized monarchical governments of the continent. This feature of the British constitution had been noted by men so different in their intellectual outlook as Halifax,[1] Atterbury,[2] and Horace Walpole ;[3] it was much insisted on by the opponents of the Peerage Bill of 1719, who maintained that its passage would destroy the balance of powers in the constitution ;[4] it had attracted the attention of Voltaire, who spoke of " ce melange heureux dans le Gouvernement d'Angleterre, ce concert entre les Communes, les Lords, et le Roi " ;[5] its happy effects had been noted by de Lolme[6] and by Vattel ;[7] and it had been emphasized by Hardwicke in 1758.[8] He said :

[1] See passages cited vol. vi 287.

[2] " We of this island enjoy a constitution moulded out of the different forms and kinds of civil government, into such an excellent and happy frame, as contains in it all the advantages of those several forms, without sharing deeply in any of their great inconveniences. A constitution nicely poised between the extremes of too much liberty and too much power, and whose several parts have a proper check upon each other, when any of them happen to tend awry," cited Beeching, Life of Atterbury 47-48.

[3] Memoirs of George III i 322.

[4] See Mr. E. R. Turner's account of this literature, E.H.R. xxviii 250-254 ; above 65.

[5] Lettres Philosophiques (ed. Lanson) i 101 ; and cp. the references to contemporary authorities cited by the editor at p. 95 ; at pp. 105-107 there is an instructive comparison between the French and the English nobles.

[6] The Constitution of England Bk. I chaps. 9 and 10, Bk. II chaps. 3, 10, 16 ; Bentham in his Fragment on Government (Montague's ed.) 189-199 ridicules Blackstone's idea that the English constitution combines the virtues of monarchical, aristocratic, and democratic government ; on the other hand he praises de Lolme— " our author has copied, but Mr. de Lolme has thought " ; but de Lolme, like Blackstone, emphasizes the separation of powers as the peculiar excellence of the English constitution ; I think that these criticisms of Bentham on Blackstone are rather a series of verbal triumphs, having many of the qualities of special pleading, than a real criticism based on an attempt to discover Blackstone's meaning ; it is this characteristic of many of the criticisms in the Fragment which gives it its piquancy, and accounts for the immediate success ; as to this see vol. xii 732-735.

[7] " Its praiseworthy constitution enables every citizen to contribute to this great end [the public welfare] and diffuses on all sides a truly patriotic spirit, which is zealously intent upon the public good. Private citizens can be seen undertaking for the honour and welfare of the nation works of considerable importance ; and whereas a bad ruler would find his hands tied in that country, a wise and prudent king will be greatly assisted in successfully carrying out his excellent plans. . . . Happy constitution, which was not obtained all at once, which cost it is true rivers of blood, but has not been bought at too dear a price," The Law of Nations, Bk. I chap. ii § 24 (Carnegie Institution ed. vol. iii p. 15) ; cp. ibid chap. iv § 39.

[8] Speech on the Habeas Corpus Bill, Yorke, Life of Hardwicke iii 15.

Let us stand upon the ancient ways. Leave the legislative power where it is; the executive power where it is; the power of beginning bills of supply where it is, and the power of judicature where it is. This is the only way to preserve this limited Monarchy upon which the Constitution, this happily mixed government, stands.

All through the eighteenth century, the fact that the powers of the state were divided between separate organs of government, which checked and balanced one another, was regarded by men of all parties, by peers as well as by commoners, and by statesmen as well as by publicists, as its most salient characteristic.[1]

That this characteristic was the main guarantee for the preservation of a balanced constitution was the view of Paley. He said that the constitution was preserved, first by a balance of power—that is "that there is no power possessed by one part of the Legislature, the abuse or excess of which is not checked by some antagonistic power, residing in another part"; [2] and secondly by a balance of interest—that is "that the respective interests of the three estates of the empire are so disposed and adjusted, that whichever of the three shall attempt any encroachment, the other two will unite in resisting it." [3] That this characteristic was the main guarantee for the preservation of liberty was the view of Hume. He said: [4]

The government which, in common appellation, receives the appellation of free, is that which admits of a partition of power among several members, whose united authority is no less, or is commonly greater than that of any monarch; but who in the usual course of administration, must act by general and equal laws, that are previously known to all the members and to all their subjects. In this sense, it must be owned, that liberty is the perfection of civil society.

Blackstone, summing up the results of the authorities, with that mixture of literary deftness and accuracy which he shows in his treatment of very many branches of law, described in classical form this characteristic of the constitution. He regarded the independent position of the courts as the most essential safeguard of constitutional liberty:

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists our main preservation of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated from both the legislative and also from the executive power.[5]

[1] The following references to Cobbett's Parliamentary History afford a few out of many possible illustrations: viii 847 (1731), the Bishop of Bangor; ix 301 (1734) Sir Thomas Robinson; 331, Lord Hervey; x 385-386 (1738), Lord Somerset; xi 339 (1740), Mr. Lyttelton; 472, Lord Carteret; 542, the duke of Argyll.

[2] Principles of Moral and Political, Philosophy (2nd ed.) Bk. VI c. 7 p. 478.

[3] Ibid 480-481.

[4] Essays Moral, Political, and Literary (ed. 1875) i 116.

[5] Comm. i 269; above 417.

He regarded the division of the legislative power between the King, the House of Lords, and the House of Commons as no less essential. Of this division he said : [1]

> And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the Legislature, the people are a check upon the nobility, and the nobility a check upon the people ; by the mutual privilege of rejecting what the other has resolved : while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct (not indeed of the king, which would destroy his constitutional independence ; but, which is more beneficial to the public) of his evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest : for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits ; while the whole is prevented from separation, and artificially connected together by the mixed nature of the Crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done ; but at the same time in a direction partaking of each, and formed out of all ; a direction which constitutes the true line of the liberty and happiness of the community.

And it must be noted that this division of the powers of the state between separate organs of government, which checked and balanced one another was as much a feature of the local as of the central government.[2] We have seen that the system of local government was made up of a series of autonomous organs, each of which, to some extent, acted as a check upon the others, and thus helped to prevent a tyrannical use of power ; and we have seen that, in the local as well as in the central government, the courts acted as umpires, defining powers and liberties and spheres of jurisdiction.

There is no doubt that the leading thinkers of the eighteenth century were right, when they singled out the mixed character and the division of the powers of the state, and the supremacy of the law which was thereby secured, as the most salient features of the eighteenth-century constitution, and the secret of its excellence. But at this point their analysis stopped. They never seem to have thought it worth while to enquire how this division of powers had been brought about, and how it was maintained. It is in the answer to these questions that we find another salient feature of that constitution, which is more fundamentally important than the others, because it is their cause.

[1] Comm. i 154-155.

[2] Above 254-256.

We have seen that both in the thirteenth and in the sixteenth centuries the units of local government were autonomous bodies which, subject to the rules of the common law, could act and develop freely on their own lines ; [1] and that this was markedly the characteristic of the numerous bodies through which the local government was conducted in the eighteenth century.[2] We have seen that, in the eighteenth as in earlier centuries, this autonomy of the units of local government, because it fostered individual development adapted to meet the new needs of different places in changing times, emphasized their separateness.[3] We see exactly the same characteristics, producing exactly the same results, in the units of the central government. Within the limits set by the law, the central government was very free to develop on its own lines ; and we have seen that it gradually and silently substituted the cabinet for the Privy Council as the governing body of the kingdom,[4] and as gradually and silently developed new offices and new departments to meet the new needs of the state.[5] The two Houses of Parliament developed rules of procedure to enable them to exercise the powers given to them, and to fulfil the duties laid upon them, by the law of the constitution, as and when they were needed.[6] The courts of common law similarly adapted their rules of procedure to meet new needs.[7] The King and the two Houses of Parliament were very free to adapt conventional rules and understandings in order to facilitate the conduct of the business of the state.[8] "In England," said Lord Redesdale, "the machine goes on almost of itself, and therefore a very bad driver may manage it tolerably well." [9] It was this autonomy in the units of central government, this capacity for development on their own lines possessed by all of these units, which, in the sphere of central government, as in the sphere of local government, had originally caused, and continued to maintain, a separation between the units of government, and their capacity to check and balance one another.

But a separation between autonomous units of government, which dates back to a time when the functions of government were not clearly distinguished, which has been maintained by the individual development of each of these autonomous units, is not likely to be a clear cut or a logical separation. In the Middle Ages the functions of government were not so clearly divided as they were in the eighteenth century ; and a gradual development to meet the exigencies of new political, social, and

[1] Vol. ii 404-405 ; vol. iv 164-165. [2] Above 134. [3] Above 135.
[4] Above 470-481. [5] Above 487-498. [6] Above 533.
[7] Vol ix 246-247, 261-262. [8] Above 626-629, 629-631.
[9] Twiss, Life of Eldon i 443, cited Halévy, History of the English People in 1815 (Eng. tr.) 37.

economic needs, will not be a logical development. It was because Montesquieu neglected the historical causes which had led to the division of the powers of the English state between these separate units of government, that the truth of his famous theory that there can be no liberty without a complete separation between the legislative, executive, and judicial powers in the state, is not proved by the British constitution of the eighteenth century; and it is for the same reason that that theory, though it is a generalization derived from his study of that constitution, is both inadequate and to some extent misleading.

Montesquieu's Theory of the Separation of Powers

Montesquieu was a jurist of the historical school; but, when he made his famous generalization from his study of the English constitution, he not only adopted a very analytical method, but based his analysis upon a very superficial study of that constitution. At the beginning of his chapter on the English constitution he says:

> When in the same person or in the same body of magistrates the legislative is combined with the executive power, there is no liberty because it is to be feared that the same monarch or senate who makes tyrannical laws will enforce them tyrannically. Again there is no liberty if the judicial power is not separated from the legislative and executive powers. If it were joined to the legislative power, the power over the life and liberty of the citizen would be arbitrary, for the judge would be a legislator. If it were joined to the executive power, the judge would have the strength of an oppressor. All would be lost if the same man or the same body of princes or nobles, or people, exercised these three powers, that of making laws, of putting into execution the resolutions of the public, and of adjudicating upon crimes or upon the disputes between private persons.[1]

It is clear that this is an analytical generalization from some of the more obvious phenomena of the English constitution of the eighteenth century. But Montesquieu, being an essentially historical jurist, and having probably been led away by that school of legal historians who delighted to minimize the effects of the Norman Conquest, and to find an Anglo-Saxon origin

[1] "Lorsque dans la même personne ou dans le même corps de magistrature la puissance législative est réunie à la puissance exécutrice, il n'y a point de liberté, parce qu'on peut craindre que le même monarque ou le même senat ne fasse des lois tyranniques pour les exécuter tyranniquement. Il n'y a point encore de liberté si la puissance de juger n'est pas separée de la puissance législative et de l'exécutrice. Si elle était jointe a la puissance législative, le pouvoir sur la vie et la liberté des citoyens serait arbitraire, car le juge serait legislateur. Si elle était jointe à la puissance exécutrice, le juge pourrait avoir la force d'un oppresseur. Tout serait perdu si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçait ces trois pouvoirs, celui de faire les lois, celui d'exécuter les resolutions publiques, et celui de juger les crimes ou les differens des particuliers," De L'Esprit des Lois, Bk. xi chap. vi.

for English liberties,[1] added, towards the end of his chapter, his famous statement that the English constitution was derived from the Germanic institutions described by Tacitus, so that "this beautiful system has been discovered in the woods." [2]

The historical importance of Montesquieu's generalization is unquestionable. He convinced the world that he had discovered a new constitutional principle which was universally valid. Locke, it is true, had advocated the separation of the legislative and executive powers, in order that tyranny might be avoided; [3] but he did not make this separation a cardinal principle. He was more concerned with his defence of the Revolution settlement, and with providing a theoretical backing for the distribution of power in the state secured by that settlement, than with analysing the parts played by the different pieces of the machinery of government. Harrington also had provided for a division of powers between senate, people, and magistracy.[4] But he was concerned mainly with mechanism; and he did not exalt, as Montesquieu exalted, the principle of the division of powers as the chief characteristic of the constitution and the main guarantee of liberty. It is because Montesquieu thus exalted this principle that he made an original contribution to political theory, which has led to different practical consequences in different countries. Two instances will prove this fact. The founders of the American constitution were so convinced that liberty could only be secured by the separation of the legislative, executive, and judicial departments of government, that they made it a fundamental principle of their constitution; [5] and they regarded the principle as so axiomatic that Madison devoted two papers in *The Federalist* to combating an objection that the proposed constitution of the United States violated it.[6] In France the principle was made the justification for a separate system of administrative courts and administrative law. The ordinary courts must be independent of the executive, and the executive ought to be independent of the ordinary courts.[7]

[1] Vol. v 475; vol. vi 586.

[2] "Si l'on veut lire l'admirable ouvrage de Tacite sur les Moeurs des Germains, on verra que c'est d'eux que les Anglais ont tiré l'idée de leur gouvernement politique. Ce beau système a été trouvé dans les bois," De L'Esprit des Lois, Bk. xi chap. vi.

[3] Two Treatises of Government Bk. II § 143. [4] Vol. vi 150.

[5] Bryce, Modern Democracies ii 12.

[6] The Federalist, nos. xlvi, xlvii; it is pointed out, first, that there was no complete separation of powers in England—indeed, as it was said in an earlier paper (no. xxxvi) it was not possible to discriminate between these powers with certainty; and, secondly, that Montesquieu really meant, not that these three powers should be wholly unconnected, but that the *whole* power of one department must not be capable of exercise by another, below 721.

[7] Dicey, Law of the Constitution (7th ed.) 333-334.

But it is certain that Montesquieu's principle cannot be applied to the British constitution of the eighteenth century. We have seen that, in the sphere of local government, the distinction between these three different functions of government did not exist; that quarter and petty sessions, in town and country alike, exercised legislative, executive, and judicial functions; and that the functions of many of the other units of local government were equally amorphous.[1] It was the same with the central government. The Crown was and still is an essential part of the Legislature; and, in the eighteenth century, the Crown was able, whenever it wished to do so, both to initiate legislation, and to exercise a considerable influence on the contents of bills pending in the two Houses of Parliament.[2] The House of Lords was and still is a part of the judicial as well as of the legislative machinery of the state. Some of the privileges of the House of Commons gave and still give to it some of the characteristics of a court of law. The courts, by means of prerogative writs, exercised and still exercise an administrative control under judicial forms, over all subordinate jurisdictions, amongst which was included in the eighteenth century, the whole machinery of local government.[3] The Lord Chancellor was and still is a judge, a member of the House of Lords, and a minister;[4] in at least one instance, the Lord Chief Justice of the King's Bench had been a member of the cabinet.[5] Moreover, we have seen that there were links of a conventional kind between the legislative and executive powers—the link of influence which the state of the representation in the unreformed Parliament rendered possible, and, at the end of the century, the link of the cabinet.[6]

It is not therefore true to say that the efficient secret of the British constitution consisted in the complete separation of the legislative, executive, and judicial powers of the state. Professor Lévy-Ullmann is quite correct when he says that England "is not the classic country of the separation of powers." He is equally correct when he says that "each unit of government has its own characteristic expression without ceasing to retain some of the features of the others."[7] The reason for this characteristic

[1] Above 224, 227, 228, 234-235. [2] Above 412-414.
[3] Above 155-156, 243-254. [4] Vol. i 397.
[5] Lord Mansfield had attended cabinet meetings, and Fox was surprised when his offer of a seat in the cabinet to Lord Ellenborough aroused opposition, Halévy, History of the English People in 1815 (Eng. tr.) 28-29.
[6] Above 629-643.
[7] "Enfin il s'est représenté la brumeuse Angleterre et les Anglais du fond de ses vignes bordelaises, sous le clair soleil de sa Gascogne. . . . Non, l'Angleterre n'est pas la patrie classique de la separation des pouvoirs. Chaque pouvoir y a reçu sa physionomie particulière sans cesser de conserver les traits des autres," Le Systeme Juridique de l'Angleterre i 376; and M. Halévy agrees: he says, History of the English People in 1815 (Eng. tr.) 31, "the British government was not a

is, as we have seen, to be found in the fact that very many of these units of government were autonomous bodies dating from a period before these three functions of government were precisely defined, and in the fact that, throughout their history, they had been developing and functioning on their own lines. Montesquieu himself was nearer to the truth when he emphasized the mixed character of the British constitution ; [1] and Blackstone and other English writers were substantially correct when they said in effect that the secret of the excellence of the English constitution was, first, the fact that the government was made up of separate units which checked and balanced one another, and, secondly, the fact that all these units were subject to a supreme law administered by independent judges.[2]

At the same time it must be admitted that there is an element of truth in Montesquieu's analysis. The mixed character of the constitution necessarily involved some division of powers. The units of government were divided. Each had its independent autonomous powers which it could use freely, subject only to a supreme law administered by independent benches of judges. This division of powers, which checked and balanced one another, did make tyranny impossible. The main faults of Montesquieu's theory were that it exaggerated the sharpness of the separation ; and that it failed to bring out the fact that it was the autonomy in the action and in the development of these divided, though not quite separated powers, which, by enabling them to check and balance one another, was the guarantee of liberty. The writers of *The Federalist* saw this, as the following passage shows :

> The magistrate in whom the whole executive power resides cannot make a law, though he can put a negative on every law ; nor administer justice in person, though he has the appointment of those who do administer it. The judges can administer no Executive prerogative, though they are shoots from the Executive stock ; nor any Legislative function, though they may be advised with by the Legislative Councils. The entire Legislature can perform no Judiciary act ; though by the joint act of two of its branches the judges may be removed from their offices ; and though one of its branches is possessed of the Judicial power in the last resort. The entire Legislature again can exercise no Executive prerogative, though one of its branches constitutes the

government in which all the powers were clearly distinguished. It was rather a government in which all the constituent parts were confused and in which all the powers mutually encroached."

[1] " Voici donc la constitution fondamentale du gouvernement dont nous parlons. Le corps législatif y étant composé de deux parties, l'une enchainera l'autre, par sa faculté mutuelle d'empêcher. Toutes les deux seront lieés par la puissance executrice, qui le sera elle-même par la législative," op. cit. Bk. xi c. 6 ; as M. Halévy says, op. cit. 31, " his two definitions of that constitution—a constitution based on the division of powers, a mixed constitution—are not equivalent, and the latter is the more accurate."

[2] Above 417.

supreme Executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the Executive department.[1]

This autonomy in the action and the development of divided, but not quite separated, powers continued to be the most salient feature of the English constitution till the Reform Act of 1832. That Act, by destroying the electoral influence of the Crown and the peers, left the House of Commons supreme, and put the finishing touch to the development of that modern system of cabinet government, which ended the eighteenth-century constitution of divided powers which checked and balanced one another.

Bagehot's book on the English constitution, which was first published in 1865, was an epoch-making book, because it was the first book to show clearly that the eighteenth-century theory of the constitution did not represent the modern facts. But Bagehot admits that this theory had once been true.[2] In fact, the views expressed by these eighteenth-century lawyers, statesmen, and publicists, English and foreign, do present a substantially true analysis of the English constitution during the greater part of the eighteenth century. And I think that we can go even further than this, and claim that the political principles deduced by some of these writers from their analysis of the constitution are as valid now as when they were written. Montesquieu,[3] Blackstone,[4] Burke,[5] and Horace Walpole [6] were all of

[1] *The Federalist* no. xlvi.

[2] "When a great entity like the British Constitution has continued in connected outward sameness, but hidden inner change, for many ages, every generation inherits a series of inapt words—of maxims once true, but of which the truth is ceasing or has ceased. As a man's family go on muttering in his maturity incorrect phrases derived from a just observation of his early youth, so, in the full activity of an historical constitution, its subjects repeat phrases, true in the time of their fathers, and inculcated by those fathers, but now true no longer," The English Constitution 1-2.

[3] Above 718 n. 1.

[4] "The constitutional government of this island is so admirably tempered and compounded, that nothing can endanger and hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution," Comm. i 51.

[5] Burke found one of the "Causes of the Present Discontents" in the fact that the House of Commons had ceased to control the executive, and had become its obedient servant—"They who will not conform their conduct to the public good, and cannot support it by the prerogative of the crown, have adopted a new plan. They have totally abandoned the shattered and old-fashioned fortress of prerogative, and made a lodgment in the stronghold of parliament itself. If they have any evil design to which there is no ordinary legal power commensurate, they bring it into parliament. In parliament their object is executed from the beginning to the end. In parliament the power of obtaining their object is absolute; and the safety of the proceeding perfect; no rules to confine, no after-reckoning to terrify. Parliament cannot, with any great propriety, punish others for things in which they themselves have been accomplices," Works (Bohn's ed.) i 350.

[6] Memoirs of George III iii 179; Letters (ed. Toynbee) xiv 333.

opinion that, if this separation of powers ceased to exist, liberty would be in grave danger. If this opinion is tried by the test of our modern experience it seems to have something of that prophetic character which is the best proof that it embodies some very permanent truths. In two cases, at least, the consequences which these writers prophesied from any disturbance of the delicate balance of the eighteenth-century constitution have come true.

(i) At the present day the power of the cabinet, i.e. the executive, over the House of Commons is enormous. The Crown and the House of Lords have ceased to provide any substantial check upon the power of a cabinet backed by a docile majority in the House of Commons; and our modern experience shows that, when the writers of *The Federalist* pointed out that there was more danger to liberty when the executive power was vested in a small council than when it was vested in a single person, they spoke truly.[1] Both the House of Commons and the cabinet have at their command a vast army of trained civil servants to carry out their behests. These civil servants will do their best to carry out the statutes, which are proposed by the cabinet, and enacted by a Parliament in which the House of Commons is all-powerful. On the other hand the cabinet and the House of Commons are willing to give to these obedient civil servants powers which enable them to usurp the functions both of the Legislature and the Judicature. Can it be said that Montesquieu, Blackstone, and Burke were wrong when they insisted upon the danger to liberty which has necessarily resulted from this close union between executive and Legislature? They had seen the results of this union of powers in an absolute King. We can see that this union of powers in an absolute democracy has precisely similar results. (ii) Burke [2] and Montesquieu [3] pointed out that a separate representation of the higher classes of society was needed if the rights of this minority were to be preserved. Both saw that, if a mere numerical majority of the people were all-powerful, there would be little security for property, and a great temptation to spoil the rich to provide for the needs or supposed needs of those who were unwilling or unable to support themselves. Horace Walpole agreed. "What," he said,[4] "is a check upon the people in a republic? In what republic

[1] "When power is placed in the hands of so small a number of men, as to admit of their interests and views being easily combined in a common enterprise by an artful leader, it becomes more liable to abuse than if it be lodged in the hands of one man; who, from the very circumstance of his being alone, will be more narrowly watched and more readily suspected, and who cannot unite so great a mass of influence as when he is associated with others," *The Federalist* no. lxix.

[2] French Revolution 74-76.

[3] De L'Esprit des Lois, Bk. xi, chap. vi, cited above 614 n. 2.

[4] Memoirs of George III iii 179.

have not the best citizens fallen a sacrifice to the ambition and envy of the worst?" Can we who live in an age when those who pay the greater part of the taxes are less adequately represented than those who receive much of their product; in an age when, in the shape of death duties, capital, which may represent the savings of generations, is taken to be squandered on the needs of some politician's programme; can we say that Burke and Montesquieu and Walpole were wholly wrong? We shall see that the stability and success of the American constitution were largely due to the sagacity with which its framers adopted and adapted large parts of the British constitution of the eighteenth century.[1]

It was against these dangers to liberty that the eighteenth-century constitution succeeded in opposing an effectual barrier. It was by means of its system of checks and balances that it succeeded in preserving liberty and at the same time in attaining a high degree of stability. These were the outstanding qualities of that constitution which won the praise of contemporary Englishmen and foreigners. It was these qualities which were the principal reason why, in this century, England was able to outstrip all her rivals in the struggle for colonial expansion. Of this achievement, and of its repercussions on English law, I must now say something. I shall describe the manner in which the English public law of the eighteenth century affected the other component parts of the United Kingdom of Great Britain and Ireland, and those other dominions in the Western and Eastern worlds, which Great Britain had acquired during this century; and, conversely, how English law in general, and more especially English public law, were affected by these expansions.

[1] Vol. xi 136-138.

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